TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1947

No. 552

VIRGIL T. BRINEGAR, PETITIONER,

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR CERTIORARI FILED JANUARY 27, 1948.

CERTIORARI GRANTED MARCH 8, 1948.

SUPREME COURT OF THE UNITED STATES

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INDEX

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MARCH 25, 1948.

[fol. a] [Caption omitted]

[fol. 1]

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE NORTHERN DISTRICT OF OKLAHOMA

No. 11307—Criminal

UNITED STATES OF AMERICA, Plaintiff,

vs.

VIRGIL T. BRINEGAR, Defendant

INFORMATION—Filed March 5, 1947

(T. 27 U. S. C. A. 223)

The United States Attorney for the Northern District of Oklahoma charges:

On or about the 3rd day of March, 1947, Virgil T. Brinegar did import twelve (12) cases of assorted taxpaid intoxicating liquor from a point in the State of Missouri to a point in Ottawa County, Oklahoma, in the Northern Judicial District of Oklahoma, such intoxicating liquor not being accompanied by such permit, or permits, license or licenses, therefor as required by the State of Oklahoma, being a state in which all sales and all importation, bringing into, or transportation therein of intoxicating liquor containing more than 4% alcohol by volume are prohibited.

Whit Y. Mauzy, United States Attorney, Kenneth G. Hughes, Assistant U. S. Attorney.

[fol. 2] STATE OF OKLAHOMA,
County of Tulsa, ss:

Kenneth G. Hughes, Assistant United States Attorney for the Northern District of Oklahoma, being first duly sworn, and having read the above and foregoing Information states that the facts contained therein are true and correct as he verily believes.

Kenneth G. Hughes.

Subscribed and sworn to before me this 5th day of March, 1947. M. M. Ewing, Deputy Court Clerk.

IN UNITED STATES DISTRICT COURT

MOTION TO SUPPRESS EVIDENCE—Filed May 5, 1947

Virgil Thomas Brinegar hereby moves this Court that the evidence in the above styled and numbered case, wherein One 1946 Ford Coupe, Motor No. IGA-270574 and 36 Gallons of Assorted Taxpaid Whiskey was unlawfully seized on the 3rd day of March, 1947, at a point three miles east of Quapaw, Ottawa County, Oklahoma, by two Investigators of the Alcohol Tax Unit, Bureau of Internal Revenue, be suppressed against him in said criminal proceeding, for the reason that said seizure was made against his will and without a search warrant.

Paul O. Simms, Attorney for Defendant.

Service of copy acknowledged, 5-5-47, Kenneth G. Hughes, Asst. U. S. Atty.

IN UNITED STATES DISTRICT COURT

MINUTE ENTRY OF DENIAL OF MOTION TO SUPPRESS AND DISMISS—May 9, 1947

Enter hearing on motion to suppress evidence and dismiss. Defendant present in person and represented by Counsel, Paul Simms—All witnesses sworn—Plaintiff's witnesses—Plaintiff rests. Enter order overruling Motion

[fol. 3] to Suppress Evidence and dismiss—Defendant arraigned and enters plea of not guilty. Defendant requests Jury trial—Case set for trial on Tuesday, May 13, 1947.

(RHS—Judge.)

IN UNITED STATES DISTRICT COURT

MINUTE ENTRY OF TRIAL—May 13, 1947

Case called for trial—Defendant present in person and represented by Paul Simms and Harry Seaton—Announce ready—Jury sworn as to qualifications—Challenged by Defendant C. V. Sellers and Curtis A. Bryan. Government waives challenges. Jury sworn to try cause: Fred C. Downs, Leslie B. Burg, William D. Scott, Charles H. Ross, Olen W. Lloyd, R. L. Oldham, A. B. Chappell, Thomas J. Derwin, Carl J. Senger, Peter P. Hancher, Dolph C. Packard, A. B. Capps. Opening statements made. All witnesses sworn in open court. Plaintiff's witnesses: John H. Maulsett, Mark H. Crehan, John Reed, Henry R. Smith, F. B. Kirkes. Government rests. Defendant moves for acquittal—overruled. Defendant's witnesses: Virgil T. Brinegar. Defendant rests. Both sides rest. Defendant moves for acquittal—overruled. Closing statements made. Jury instructed and retires for deliberation. Jury returns verdict finding defendant guilty—verdict received and filed in open court—Jury discharged. Judgment and sentence passed to Friday, May 16, 1947.

(RHS—Judge.)

IN UNITED STATES DISTRICT COURT

VERDICT—May 13, 1947

We, the jury in the above-entitled cause, duly empaneled and sworn, upon our oaths, find the defendant Virgil T. Brinegar is guilty, as charged in the indictment.

A. B. Chappell, Foreman.

Filed in Open Court May 13, 1947.

[fol. 4] IN UNITED STATES DISTRICT COURT

JUDGMENT AND COMMITMENT—May 13, 1947

On this 13th day of May, 1947, came the attorney for the government and the defendant appeared in person and by counsel, Paul Simms and Harry Seaton.

It is adjudged that the defendant has been convicted upon his plea of not guilty, and a verdict of guilty of the offense of transporting twelve (12) cases of assorted tax-paid intoxicating liquor from a point in the State of Missouri, to a point in Ottawa County, Oklahoma, in the Northern Judicial District of Oklahoma, such intoxicating liquor not being accompanied by such permit, or permits, license or licenses, therefore as required by the State of Oklahoma (Title 27, U. S. C. A., Sec. 223), as charged in count one of the information, and sentence having been passed to May 16, 1947; Now on this 16th day of May, 1947, the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It is adjudged that the defendant is guilty as charged and convicted.

It is adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of Thirty (30) days and pay a fine unto the United States of America in the sum of One Hundred ($100.00) Dollars and that said defendant be further imprisoned until payment of said fine, or until said defendant is otherwise discharged as provided by law.

It is adjudged that execution of sentence be stayed until May 23, 1947, at 10:00 A. M.

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

Royce H. Savage, United States District Judge.

[fol. 5] O. K. as to form: Kenneth G. Hughes, Asst. U. S. Atty.

Filed May 20, 1947.

IN UNITED STATES DISTRICT COURT

NOTICE OF APPEAL TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT—Filed May 23, 1947

1. The name and address of the appellant is Virgil T. Brinegar, Vinita, Oklahoma.

2. The names and address of appellant's attorneys are Paul O. Simms, Vinita, Oklahoma, and Harry Seaton, 717 Ritz Building, Tulsa, Oklahoma.

3. The offense is the importation of twelve cases of assorted taxpaid, intoxicating liquor from the State of Missouri to a point in Ottawa County, Oklahoma, in the Northern District of Oklahoma.

4. Concise statement of judgment: Judgment rendered May 16, 1947, sentencing the said appellant to Thirty Days and $100.00 fine; said appellant to be confined in an institution designated by the Attorney General of the United States; appellant now at large on bail.

I, the above named appellant, hereby appeal to the United States Circuit Court of Appeals for the Tenth Circuit, from the above stated judgment.

Dated May 22, 1947.

Virgil T. Brinegar, Appellant. Paul O. Simms, Harry Seaton, Attorneys for Appellant.

Clerk's Statement.—Docket reflects copy of Notice of Appeal served on Whit Y. Mauzy, U. S. Attorney, May 23, 1947.

[fol. 6] IN UNITED STATES DISTRICT COURT

ORDER EXTENDING TIME WITHIN WHICH TO FILE AND DOCKET APPEAL—Filed June 25, 1947

Now on this 25th day of June 1947, pursuant to Rule 39(c), for good cause shown the Court does hereby extend the time for filing the record on appeal with the United States Circuit Court of Appeals for the Tenth Circuit and

the cause or proceedings therein docketed for an additional 30 days from this date.

Dated this 25th day of June, 1947.

Royce H. Savage, District Judge.

Service of copy of Order acknowledged 6-25-47. Kenneth G. Hughes, Asst. U. S. Atty.

IN UNITED STATES DISTRICT COURT

Condensed and Narrated Statement of Evidence on Defendant's Motion to Suppress—Filed July 15, 1947

Be it remembered that on the 9th day of May, A. D., 1947, in the above-designated Court, sitting at Tulsa, Oklahoma, the Honorable Royce H. Savage, United States District Judge, presiding, this above-styled and numbered cause came on regularly for hearing upon defendant's motion to suppress.

APPEARANCES

The plaintiff was represented by Whit Y. Mauzy, United States Attorney, and by Kenneth G. Hughes, Assistant United States Attorney for the Northern District of Oklahoma, Attorneys and Counselors at Law, of the State of Oklahoma.

The defendant was present in person and represented by Paul O. Simms, Esq., Attorney and Counselor at Law, of Vinita, Oklahoma.

[fol. 7] Thereupon the following proceedings were had to-wit:

The testimony of VIRGIL T. BRINEGAR, offered by movant, on his own behalf, and received in evidence was in substance and effect as follows:

Direct examination:

My name is Virgil Thomas Brinegar. On or about the 3rd day of March, 1947, while driving a 1946 Ford Coupe, I was apprehended by Agents of the Alcohol Tax Unit. My car was searched at that time. I did not give consent to the search of the car. This search was made about three

miles east of Quapaw, Oklahoma. No search warrant was served on me at the time. I never did give consent to the search of the car.

After the car was searched, the officer took the car and everything that was in it; there was some whiskey in the car which the officers seized.

I don't know the names of the two Federal Officers. I believe the officers were from Kansas.

Cross-examination:

I don't know the dates exactly. I suppose it was on the 3rd of March, 1947. I think there were somewhere around ten or eleven cases of whiskey in the car; ten cases in the cases and some in the lugs. I first saw the Federal Agents' car at the bridge. They asked me, "How much whiskey have you got in there?" I said, "Not too much.".

I had been in Joplin that day. The officers followed me from the bridge to where they caught me; I would say a distance of half a mile or three-quarters possibly. There was a case of whiskey in the front seat of the car, but it was covered up with a laprobe. The remainder of the whiskey was under the front seat. This Ford Coupe was a Merchant's Coupe—the seat just raises up, that is the back of the seat raises up on hinges and there is quite a space in there. The whiskey that was in the car belonged to me.

[fol. 8] The testimony of JOHN A. MALSED, offered on behalf of the Government, and received in evidence was in substance and effect as follows:

Direct examination:

My name is John A. Malsed. I am an Investigator, Alcohol Tax Unit. My post of duty is at Pittsburg, Kansas. On March 3, 1947, I was working on the north edge of the State of Oklahoma. Special Investigator Creehan was with me; I saw the defendant, Virgil Brinegar, on that date. As to how long I had known Virgil Brinegar, well we arrested him on September 30, 1946, for hauling liquor. I have seen him in Joplin loading liquor into an automobile on occasions other than the time I arrested him. I have known him for some time as a man hauling liquor.

We were sitting on the side of the road about a quarter

of a mile east of the Quapaw bridge. The road runs east and west. We saw Mr. Brinegar coming down the road in this Ford Coupe. We first saw the Brinegar car about a mile back where the road turns—I mean a mile east of where we were sitting. I first recognized Mr. Brinegar as the driver when he passed. I had seen him in that same automobile before.

Q. Did his car appear to be heavily loaded or did it appear to have any load in it at all?

A. Yes, it was loaded.

Q. You immediately started chasing him, did you not?

A. That's right.

When he passed us I told Investigator Creehan that it was Mr. Brinegar—Creehan was driving the car—we started to follow Mr. Brinegar here, and Brinegar then increased his speed, and you go just—from where we were sitting I imagine you go possibly an eighth of a mile, and you make a curve and then another curve to go over the bridge. They are both sharp curves. Mr. Brinegar took those curves rather fast, and at the time. I thought possibly he might hit the bridge, because of his speed, but he got on the bridge and crossed the bridge, and then from—on the west side of the bridge you go west a short distance and you make a curve and [fol. 9] then another curve, and then finally you curve north and down a hill, and then come up another hill, on that hill is another curve, and on that place his car began skidding and he slowed down. Up to that point we were not gaining on Mr. Brinegar at all, although our car was going as fast as it could, but when he went around that curve we were able to gain on him, and pull alongside of him, where Mr. Creehan sounded the siren, and Mr. Brinegar kept on a little ways further, and then finally stopped in the side of the road there almost in the ditch.

I got out of the car. I asked Brinegar, I said, "How much liquor have you got in the car this time?"; he says, "Oh, not so much" or something of that nature.

Mr. Brinegar: "Not too much, I said."

Then when I finally questioned him, and he said and told me finally that there was about twelve cases in the car. However, there was one case of Schenley's that was on the floor of the car, at the rider's seat—at the passenger's

seat there, not covered up; it was perfectly clear; I could see it was Schenley's; never did disturb it. Then there was a bottle, I think that he was drinking out of in the seat, and the rest of it was then underneath and back of the seat, as you lift it up. I arrested Mr. Brinegar then after I found whiskey in the car. There were thirteen cases and I believe one or two bottles of whiskey in the car.

Cross-examination:

At the time Mr. Brinegar came by me I knew the car, and I knew Mr. Brinegar. I had arrested him once before. That case was not disposed of; it is pending in Missouri at the present time; he has been indicted by the Federal Grand Jury at Kansas City.

This thirteen cases of liquor were in pints and fifths—I just believe pints and fifths were all there were. A case of fifths will weigh about forty-two pounds and pints forty-eight to fifty pounds. The liquor was in the center of the car and not in the turtle back. The weight would be in the center of the car.

The Court: "Well, Mr. Simms, this witness has not testified that the springs were sagging or anything of that [fol. 10] sort. I don't think his testimony tends to indicate that the car had such an appearance as to afford probable cause. He just said that it appeared to be heavily loaded."

Mr. Simms: "Heavily loaded. And that is what I was——"

The Court: "Well, that is not enough in my judgment unless you can describe that more particularly, the appearance which would constitute probable cause. I am going to assume that the appearance of the car, based on his statement that it was heavily loaded, is not enough to constitute probable cause."

The conversation I had with Mr. Brinegar at the time that I stopped him was similar to what I said; I went up and I ask him—he knew me. I says, "Brinegar, how much liquor have you got in the car at this time?" and he said to the effect, "Not so much" or something of that type. He was sitting in the car at the time. I asked him where he had gotten the liquor. I asked him if he had gotten it at Springfield; the liquor that was in the front seat was not covered. You could see the case very easily. It was a Schenley case.

Q. "Had you arrested Mr. Brinegar at that time, when you came up you arrested him, placed him under arrest?

A. No, I had not arrested him at that time.

Q. When did you place him under arrest?

A. Oh, I don't know, just about when it was we did place him under arrest, I couldn't say exactly.

Q. But he never gave you consent to search the car?

A. No, I didn't ask his consent to search the car.

Q. You had no search warrant?

A. No, we had no search warrant."

The testimony of MARK H. CREEHAN, offered by the Government and received in evidence, was in substance and effect as follows:

My name is Mark H. Creehan. I am a Special Investigator, Alcohol Tax Unit, Kansas City, Missouri. I was present with Mr. Malsed at the time on March 3, 1947, [fol. 11] when we gave chase to and apprehended Virgil Brinegar. We first discovered Mr. Brinegar at about 6:00 p. m., while parked on this road as described by Mr. Malsed. I looked through the rear vision mirror and saw a car rounding the curve about a mile east of our position. As this car passed I saw the car was heavily loaded, and weighted with something.

As he passed us he increased his speed at that moment, and we gave chase; we chased him for about a mile and as I was unable to go up along side of his car; I sounded my siren. He continued and I was forced to push him over to the side of the road before he would stop.

After I stopped I did not immediately have any conversation with him. The conversation took place principally with Investigator Malsed. I heard that conversation. The conversation was substantially as related by Mr. Malsed.

Cross-examination:

Upon stopping Mr. Brinegar I did not look in the turtleback of the car first—neither one of us looked in the back end of the car at that time. Yes, sir, we did later. I did not recognize Brinegar when he came up to where we were sitting, because I personally didn't know the man. I followed Mr. Brinegar upon information that I received from Mr. Malsed. That was the first time I had ever seen

Brinegar. The road is pretty crooked there at the bridge. It is a gravel road and there was a number of curves. I would say that it was approximately one mile from the place that I first saw Brinegar until we apprehended him.

Q. You didn't have a search warrant?

A. No, sir.

Q. And he did not give consent for the search of the car?

A. I don't know whether you term this consent: He was asked where the liquor was and he said behind the seat.

Q. Was that after you had begun to search the car?

A. No, that was after the question was asked, how much liquor he had, and he said approximately twelve cases.

Q. He said approximately twelve cases?

[fol. 12] A. Yes, sir, he didn't make that statement at first, sir, he said a little liquor; he said I have got a little liquor.

Redirect examination:

Q. And did he say, "Not too much"?

A. "Not too much," it was along that line.

Q. Mr. Creehan, you stated that you followed this car as a result of the information received from Mr. Malsed. I will ask you whether or not the load of the car and the fact that he increased his speed immediately on passing you gentlemen also entered into your chasing.

A. I called the condition of the car to Mr. Malsed's attention, practically simultaneous the statement was made or the information was imparted to me by Malsed——

Q. And you took after him as the result?

A. That's true.

Q. This statement that he made that the whisky was behind the seat was before you ever gave him any indication that you intended to place him under arrest, is that right?

A. That's true, sir.

Cross-examination:

As to whether the car showed to be heavily loaded—it was weighted; you could see that it was weighted with something. No, I wouldn't say the backend was down, but it just had the appearance of being heavily weighted. This liquor was behind the driver's seat in sort of a compartment, and I would say to the middle and somewhat to the rear of the car.

The Court: The witness has already stated there was no appearance in the rear that indicated—that the car was heavily loaded. Usually the testimony is that the springs were sagging and so on, but we don't have that in this case. (Testimony closed.)

COLLOQUY BETWEEN COURT AND COUNSEL

Thereupon the following proceedings were had in substance and effect:

The Court: What do you think about this case, Mr. Hughes?

Mr. Hughes: If Your Honor please, my idea about it is that there is very little question but what the search is [fol. 13] good under the circumstances, primarily for this reason: That Mr. Malsed on numerous occasions had seen Mr. Brinegar; they chased him theretofore and had arrested him one time before. The point I make is that Mr. Malsed was fully familiar with who Brinegar was, when he came down the road. In this case we don't have a question of an informant from a particular unknown source. In this particular instance the agent himself knew the man, without the necessity of an informant. The car appeared to be heavily weighted; knowing where he was and the direction from where he was coming; this was only about three or four miles, as I understand, from the Missouri line, and when they gave any sign of moving off after him, he immediately took off in an attempt to out-run them. And then too, after he was finally stopped he makes the admission that he has possession of whiskey before they make any attempt to search his car.

The Court: Well, I think that is what it turns on. It is my judgment that the mere fact that the agents knew that this defendant was engaged in hauling whiskey, even coupled with the statement that the car appeared to be weighted, would not be probable cause for the search of this car. To so hold would in effect be to say to the officers that they may just make a search of the automobiles of known bootleggers on sight; that is about what it would amount to in my judgment. But the statements of the defendant made in themselves would constitute probable cause for the search. The only question in my mind is whether statements made under the circumstances that these were made would justify the search. Now, you understand he

was followed by these officers and they ran him off the road and made him stop. Now, I am inclined to think that he was in legal contemplation under arrest at the time they were having their conversation with him and if he was, the arrest was probably unlawful. There was not probable cause for the arrest in the first place. Now, I never have been able to satisfy my mind just what position we are in where the statements made by a party which would afford probable cause for a search are made while in custody pursuant to an unlawful arrest.

[fol. 14] Mr. Hughes: If Your Honor please, in connection with that I have a case here from the Tenth Circuit, 159 Fed. (2), 85, Morgan against the United States . . . (Here case was quoted) And I don't know really how a case could be more clearly exactly like this one.

The Court: I don't either. The only thing it raises the question in my mind about the person not being under arrest. It looks like when they chase somebody a mile and run them off the road to make them stop that you have got an arrest. When do you arrest a party?

Mr. Hughes: Of course, that is a question that I think is going to be impossible to determine at any time is actually when a man is under arrest.

Mr. Simms: He ceased to go of his own free will at the time the officers stopped him if the Court please.

The Court: Of course, that point is not discussed.

Mr. Hughes: It is discussed only to this extent——

The Court: He just said he was not under arrest. The Court says he was not under arrest.

Mr. Hughes: These officers were sitting along the side of the road.

The Court: They stopped him.

Mr. Hughes: I might read this: "When they drove to a wye on the highway about six miles south of town, where the car in question shortly passed them, going toward Lawton. They drove up alongside of the car and recognized Morgan as the driver." That is exactly what happened in this situation. "They stopped him." Now, whether they stopped him by what means they still stopped him.

The Court: That's right.

Mr. Hughes: "And Pauly got out of the car and Mogridge drove the officers' car in front of the Morgan car." In other words, they drove the car in front of the car so that it

would make it impossible for him to leave the scen. And the court holds that at that time he was not under arrest.

Mr. Simms: I have not read the case but my remembrance is that there was something, that he was not voluntarily talk-
[fol. 15] ing to them here, if the court please.

The Court: Your client voluntarily talked——

Mr. Simms: There had not been nothing, why they had stopped him and drove him into the road, as to the matter of arrest——

DENIAL OF MOTION TO SUPPRESS

The Court: They were stopped in this case. Of course I am—personally it is my view that some court some day is going to hold that when the officer takes in after an automobile and forces it off the highway and stops him, and then engages the party in conversation, that that party is under arrest. I think that he is under arrest when they stop him, even though they don't say, "You are under arrest"—don't serve a warrant—they don't have a warrant. But I don't see any escape from it. I don't know of any case though where a court has actually passed on the question.

Now, this is what I am talking about—whether statements voluntarily made by a party unlawfully arrested may be considered in determining whether there is a probable cause for a search. Assume that this defendant was under arrest at the time he made the statement and that the arrest was unlawful, there was no probable cause for the arrest, then there is still a question as to whether those statements might be considered in determining the probable cause. I don't know of any case that holds that they may not; in fact I don't know of any court that has passed on that question, but this case is squarely in point, I agree with you; I don't see how the case can be distinguished. And the court does make the statement, although apparently there was no particular point made of it, he does make the statement that the party was not under arrest, although he had been forced to stop by the officers. And while I might be inclined to disagree with that statement, that does constitute an arrest. As I said heretofore, I find when I disagree with the Circuit Court, their view always prevails, so I am going to go along with them. Motion will be overruled.

Mr. Simms: Give us an exception.

[fol. 16] IN UNITED STATES DISTRICT COURT

Narrative Statement of Testimony at Trial—Filed July 15, 1947

Be it remembered that on the 13th day of May, A. D. 1947, in the above-designated Court, sitting at Tulsa, Oklahoma, the Honorable Royce H. Savage, United States District Judge, presiding, this above-styled and numbered cause came on regularly for trial to a jury.

APPEARANCES

The United States was represented by Whit Y. Mauzy, United States Attorney for the Northern District of the State of Oklahoma, Attorney and Counselor at Law, of Tulsa, Oklahoma, and by Kenneth G. Hughes, Assistant United States Attorney for the Northern District of Oklahoma, Attorney and Counselor at Law, of Tulsa, Oklahoma.

The defendant was present in person, and represented by Paul O. Simms, Esq., of Vinita, Oklahoma, and Harry Seaton, Esq., of Tulsa, Oklahoma, Attorneys and Counselors at Law.

And thereupon the following proceedings were had, to-wit:

The twelve jurors were called into the box, statement made by the Court, jury was sworn and opening statement made by Government Counsel.

The testimony of JOHN A. MALSED, offered by the Government, and received in evidence was in substance and effect as follows:

Direct examination:

Mr. Seaton: Comes now the defendant and objects to the introduction of any evidence for the reason that any evidence that was obtained in this case was obtained in violation of the fourth and fifth amendments to the constitution.

The Court: Overruled.

Mr. Seaton: Exception.

[fol. 17] My name is John A. Malsed. I am an Investigator, Alcohol Tax Unit, Pittsburg, Kansas. I have been an

Investigator for about fourteen years. On the 3rd day of March, 1947, I, along with another Investigator, Special Investigator Creehan of the Alcohol Tax Unit, were parked on what is known as "Devil's Promenade Road" in the Northern portion of Oklahoma. That road is directly east of Quapaw, Oklahoma, and runs east there, and over a number of curves, across the bridge over Spring River, then continues east for about a mile and a quarter or a mile and a half where it jogs about a quarter of a mile south, and then continues on east into Missouri, over Missouri Highway 43; that is the highway from Joplin to Seneca, Missouri. We were sitting on this highway in an automobile. We saw the defendant, Virgil T. Brinegar; we saw this car the first time as it came around the curve in the road coming from the east. We were sitting about a quarter of a mile east of the Quapaw Bridge on this gravel road. The car passed us and as it passed us I recognized Mr. Brinegar as the driver of the car, I have seen him before, yes, sir.

Q. How many times before, please, sir?

A. Well, the first time I saw Mr. Brinegar I think was on September 21-23.

Q. And where did you see him please?

A. At Joplin, Missouri.

Q. What was he doing at the time you saw him?

A. At the time I saw him he was gathering up some liquor in a truck.

Q. Then did you see him another time?

A. I saw him on September 30.

Q. And what was he doing at that time, please, sir?

A. He was gathering up liquor in a truck.

Q. And did you arrest him on either occasion?

A. We arrested him on September 30.

Mr. Simms: I object to that.

The Court: Just a moment.

Mr. Simms: Sir?

The Court: I was giving you an opportunity to state the objection.

[fol. 18] Mr. Simms: I object to that as to the arrest, without showing a conviction. I think they could show a conviction but not just an arrest.

The Court: Objection sustained.

Q. Did you at any other time see the defendant with a load of liquor headed towards Oklahoma?

A. I saw him on September 23, and September 30, and then on March 3rd.

Q. And did you—well, strike that. Now, then, on this occasion when you saw him coming a mile down the road and he came by you, you recognized him because you had known him for sometime, isn't that true?

A. That's right.

Q. And you chased his car, didn't you?

A. That's right.

Q. As you had done the other?

A. Yes.

Mr. Seaton: Now, if Your Honor please——

The Court: Just a minute; do you object to that statement by counsel?

Mr. Seaton: Yes, sir.

Mr. Hughes: Well, I will withdraw that statement.

The Court: Objection sustained.

Well, as he came by I recognized the car which I had seen before in Joplin, and I recognized Mr. Brinegar. So Mr. Creehan was driving the car, so we started following Mr. Brinegar's car. He immediately began to increase speed. About at this Quapaw bridge, it had been washed out and the road isn't completely built up yet, although it is very passable. There are two curves, one very sharp curve going over the bridge. Mr. Brinegar took both of these sharp curves at a high rate of speed and made the bridge, went across the bridge, and he continued on, and on the west side of the bridge there are two or three more curves. The last one is about a mile—about a half a mile north, and goes up a hill. As the car went up the hill we were able to get up even with the car—before that time we weren't able to gain on him in speed. I wouldn't know how fast we were driving. I would say about 200 yards past the curve we were able to stop Mr. Brinegar. [fol. 19] I got out of the car and went up to Mr. Brinegar's car, and I said, "Well, Brinegar, how much liquor have you got in the car now." "Well," he says, "Not so much" or words to that effect. And on the floor of the car was one case of liquor; it was on the floor in the passenger's seat. This car was a 1946, six-cylinder Ford Coupe, and behind the coupe, in a compartment behind the seat, by lifting

up the seat, was a number of cases of whiskey and liquors, and a few lugs—what I mean by "lugs" a package of liquor.

I told Mr. Brinegar that I had seen him in Joplin and he said he had been in Joplin, but that I had not seen him put any liquor in the car. I told him I had not seen him put any liquor in the car in Joplin that day. I do not know of my own knowledge whether this defendant has a wholesale or retail liquor dealer's stamp. He told me on the road out there that day that he has a retail liquor dealer's stamp, and a wholesale liquor dealer's stamp, and ask- me if it would make any difference. I told him that it didn't make any difference. I said, "Well, you are not going to Hiwasse with this liquor." He said he was going to Vinita with this liquor. Hiwasse is in Arkansas. He told me that he was going to drink the liquor. I had had conversations previously with him on drinking liquor, and I told him, I says, "Well, you drink an awful lot of liquor, by the amount of liquor you have been buying."

Cross-examination:

The Quapaw Bridge is about five miles from the Missouri-Oklahoma line, and it has two or three hills on it. The road is straight from Missouri Highway 43 on over until you get to a— I suppose a correction line there about a mile or a mile and a quarter east of the Quapaw Bridge. It is not particularly wooded country, only in spots. There is a good deal of timber all the way, all along that road, especially in Missouri.

We were parked about I would say a quarter of a mile east of the bridge, on the straightaway. We were headed west. That was the direction that Mr. Brinegar was traveling. As he passed us I would say we chased him a mile [fol. 20] and a quarter or a mile and a half before he stopped. That road was rather crooked, had several curves in it.

I imagine when he passed us he was traveling possibly about thirty-five or forty miles an hour. That road is rough all the way across there. It had rained and in places, especially on the hills, the road was very slick. We started after him from a dead stop. I would say he was driving possibly thirty-five miles an hour; I could not determine exactly the speed of a car by sitting beside it. I don't know just how fast we were going at the time.

All I know, we were struggling to get up to him. I testified that he said he didn't have too much liquor, or words to that effect; I would not say exactly what words he said.

Mr. Creekmur was driving the car and I was on the righthand side. I was the first to get out of the car. We had stopped at the side of and to the front of Mr. Brinegar's car, and I walked back to his car. I said, "Hello, Brinegar," I said, "How much liquor have you got in the car?" I imagine that I was possibly ten or fifteen feet from the car when I spoke to Brinegar.

Q. Then, what did he do, if anything?

A. He got out of the car at that time. I looked in the car and saw the one case of liquor, and then I pulled up the seat and saw the other liquor underneath the seat. I never looked at the backend at all. I don't remember whether I asked if the backend was locked or not, but I don't believe that I did, because I don't think that I looked in the turtle-back at all. I asked him if he was going to Hiwasse with the liquor, and he said, no, he was going to Vinita this time. I asked him where he had obtained the liquor. Very evasively he said, "Over there." I asked him if he got this liquor at Springfield and he said no. I did not then ask him whether he had gotten it at Joplin. I asked him where he got it then. His reply was—very evasively he said, "Over there," as he pointed to the east. I said, "Over where?" He said, "Oh, right down there, right down the road there." It was about six o'clock in the evening when we saw this car.

By the Court:

Q. And I believe you testified that you had seen him up in Joplin on that day?

[fol. 21] A. No, I said to him, "I have seen this car in Joplin" and he said he had been there that date, but I had seen this car before in Joplin and had followed it.

The Court: He said he had been in Joplin that day?

A. That's right.

The Court: Is that all that was said—anything said about what time he had been there that day or anything about it?

A. No, I never asked him what time.

The Court: But you had not seen him on that particular day?

A. On that particular day I had not seen him; Mr. Brinegar misunderstood me.

The Court: Until you saw him approach in this automobile?

A. Sir?

The Court: Until you saw him approach in this automobile?

A. That's right, that's the first time I saw him that day.

Redirect examination:

Q. Now, then, after you made a search of this car, Mr. Malsed, you placed the defendant under arrest, did you not?

A. Yes, sir. I accompanied Mr. Brinegar to Miami, Oklahoma. I drove the car into Miami and Mr. Brinegar was then turned over to the local agents of the Alcohol Tax Unit here.

Cross-examination:

Q. When did you place him under arrest, Mr. Malsed, as you have testified?

A. Do you mean as to time?

Q. Did you tell him that he was under arrest at any time?

A. Yes, I did.

Q. When?

A. It was after we searched the car and talked to Brinegar.

Q. About how long after you had stopped him on the road?

A. I would say 15 minutes or longer.

Q. After you made the search and talked with him?

A. That's right.

Q. Fully 15 minutes after you stopped the car?

A. I imagine it was that long.

[fol. 22] Q. Up to that time you had never said anything about arrest, is that true?

A. No, I don't believe I had, I possibly told him we would have to take him in.

Q. In that regard then, what was the conversation, Mr. Malsed?

A. What is——

Q. I say, what conversation—what did you say to the defendant here and what did he say if anything as to the arrest?

A. At what time.

Q. At the time that you say, 15 minutes afterwards, as to the arrest.

A. I told him we would have to take him in.

Q. And that is what you did?

A. Yes.

Q. And that's all that you said, was it?

A. That was about it.

Q. And where did you say you were going to take him; did you say?

A. I don't know as I said where we were going to take him.

Q. The only thing that you said was that "Brinegar, we have got to take you in," is that right?

A. We are taking you in, yes.

Q. All right.

A. Or words to that effect.

The testimony of Mark H. Creehan, offered on behalf of the Government and received in evidence, was in substance and effect as follows:

My name is Mark H. Creehan. I am a Special Investigator, Alcohol Tax Unit, Kansas City, Missouri. I was with Mr. Malsed on March 3, 1947, when we searched and arrested Virgil T. Brinegar. Our car was parked I would say approximately a quarter of a mile from the Quapaw Bridge by the side of the road. I first noticed the car in which Brinegar was riding as it rounded a curve which was approximately a mile east of our position. That is toward the State of Missouri. As this car passed our position I saw the car was weighted and loaded, and due to information received from my partner, Mr. Malsed, I started our car and gave chase. As this car in which Brine- [fol. 23] gar was riding passed our car he immediately increased his speed. We chased him approximately a mile or maybe more. I know it was a mile, before we were able to bring him to the side of the road. As I got close to the side of his car I sounded my siren and started pushing him over. He at the time would not stop. It was necessary for me to push him really over to the side of the road before he would stop. At that time Malsed got out of the car and approached Brinegar and said, "Brinegar, how much whiskey have you got on you?"—

"How much have you got on this time?" Brinegar says, "Not much; just a few cases for my own use." And I couldn't say definitely but I believe that was when he stated he had approximately eleven or twelve cases of whiskey. He says, "Where is it?" Incidentally, there was a case of Schenley on the floor, to the right of the drivers' seat. I think he directed our attention—I believe he directed our attention to the fact that it was in the rear of the seat—in the compartment. I then, after we found the whiskey in cases and lugs in the compartment, I believe that I requested his keys to look into the rear of the car—the turtle back. Malsed asked him where he obtained this whiskey and he said, "Oh, down there a little bit," pointing toward the east. He said, "Where down there?" "Oh," he said, "Down there a piece."

There was approximately between twelve and thirteen cases of whiskey in the car.

Q. Did you then place him under arrest?

A. Not until after the search, sir. In fact there was no formal arrest made until a liftle later; we were satisfied with our search, and we said "Well—" In fact, I think I advised Malsed to take him into Miami. He was taken into Miami. I didn't take him in—I went on further duty.

Cross-examination:

I didn't take him into Miami. The other officer took him in. Whether he drove the car I could not say.

Q. You never formally placed the defendant under arrest, did you?

A. As to so many words, no. As to placing our hands on [fol. 24] him, no. Well, I think there was some statement that was, "Well, you get in the car, come along with us"—something along that line; the exact words I don't remember. When we drove into Miami, when the car was driven into Miami Starett had arrived on the scene.

As to how fast the defendant was driving at the time that we got up even with him—well, I am—this is all conjecture on my part; I would say he was going approximately sixty miles an hour. The first thing I observed about the defendant or his car, is that his car was weighted or loaded. When I got even with his car I was only interested in pulling him over to the side of the road, and stopping him. The first time I observed any liquor was when I got to the side of the car. The door had been opened at that time and

the defendant had stepped out. Brinegar was talking to my fellow officer.

I made a search of the turtle back. I believe I requested the keys for that, sir, that was after the original search in which we found the liquor. I did not ask the defendant where he got the liquor. Malsed asked him that question. The same is true as to where he was taking the liquor.

Yes, I was driving the car. Mr. Malsed was on my right. Upon stopping our car Mr. Malsed got out of the car first. He went over to the defendant and the first questions asked were asked by Mr. Malsed. I had no conversation with the defendant outside of the presence, and out of the hearing of Mr. Malsed. All three of us were there. I heard Mr. Malsed testify that he had conversation with the defendant, and his testimony is in substance correct. I had very little conversation with the defendant, only a few questions. The turtle back might have been unlocked, I couldn't definitely say, but my recollection is that I requested the keys from Mr. Brinegar and opened it. I found nothing in there at all, sir. There were between twelve and thirteen cases of liquor in the car. It was located behind the front seat, but of course extended towards the rear.—Twelve cases occupy quite a bit of space. It was in about the center of the car and a little to the back, that is correct. Definitely, I don't know how much a case of whiskey in pints weighs, but I would say pints and fifths and so on would run any-[fol. 25] where on an average from forty-two to forty-eight pounds. This liquor was in pints and fifths.

Q. In regard to the case on the floor that you have testified, I will ask you if there wasn't a laprobe or something in the car there, a cover in the front seat of the car, a robe?

A. I don't recall it, sir.

Q. You don't recall that there was a robe in the car?

A. I don't recall at this time.

Q. You wouldn't say that there wasn't?

A. No, sir, I wouldn't; I know that I could see the case of Schenley.

Q. That was after you went over and Mr. Malsed was there?

A. Well, Mr. Brinegar had got out of the car when I—we make it a point to have the defendant get out so that he can't get away and get the car.

Q. In other words, as soon as the car was stopped you had Brinegar get out of the car, is that right?

A. No, I think the first conversation—maybe the first question that was addressed to Brinegar was addressed while he was in the car.

Q. But he immediately, he was taken out or ordered out of the car, isn't that right?

A. He was requested to get out.

Q. Requested to get out of the car?

A. Yes, sir. Yes, I had gotten out of my car then; as soon as my car came to a stop, I immediately got out also. I was on the left or driver's seat. I had to come around to his left. Both Mr. Malsed and I were on the left side of Brinegar's car. When Brinegar got out of the car I would say that Malsed and I were maybe a foot of each other; we were practically with each other at that time.

Q. Did you open Brinegar's car to let him out or did he open it himself?

A. Well, now, that I can't say, sir.

Q. You don't remember that?

A. No, I can't say that.

Q. You don't know just how far you were from the Brinegar car at the time he got out; in other words you were not leaning up against the car at the time Brinegar got out and the conversation wasn't had with Brinegar while he was in the car?

A. Some of the conversation, yes, the first questions were addressed to Brinegar when he was in the car.

[fol. 26] Redirect examination:

Q. You didn't have Mr. Brinegar get out of the car until after he had made the statement, "I have some for my own use," did you?

A. No, sir.

The whiskey which we found in Brinegar's car was not removed. I left it in Brinegar's Ford. I am not able to identify that whiskey at this time.

The testimony of JOHN REED, offered by the Government and received in evidence, was in substance and effect as follows:

My name is John Reed. I am an Investigator, Alcohol Tax Unit, Tulsa, Oklahoma. I was not present with the two officers when defendant was ar-ested. I was called to

Miami, Oklahoma. At that time I interviewed the defendant. I also took into custody his car—a 1946 Ford. I took Government's Exhibits 1, 2 and 3 from the Ford Coupe driven by Brinegar. I marked this number 1366 on the side of the case. That number represents our Oklahoma Northern District case number, as to our Unit, for identification.

Mr. Hughes: If Your Honor please, I would like to introduce in evidence the three cases, Government's Exhibits 1, 2 and 3.

The Court: All right, they may be admitted.

On the 4th day of March I had a conversation with Mr. Brinegar. The Miami police brought Mr. Brinegar out of jail up to the police station, and there is where I first met Mr. Brinegar and talked with him. Mr. Brinegar began talking to me about the liquor business and about the deal; and I explained to him that he didn't have to make any statement, that anything he said might be used against him. I asked him if he had an attorney; he was entitled to an attorney. He said he didn't have.

Brinegar said he left Vinita about noon and drove to Joplin with the idea of trading his automobile for a pickup truck. However, he didn't talk with any car dealers as he [fol. 27] drove around the used car lots, and didn't see the type of truck he wanted, according to his statement. He said he had been in Joplin about two and one-half or three hours. I asked him where he procured this whiskey, and he said he was driving toward home from Joplin, and back a ways before he came to the Quapaw Bridge there was a fellow parked by the side of the road who stopped him and said, "Don't you want to buy some whiskey"; and the fellow offered him a pretty good prise on it, and he just bought this load of whiskey. He said he didn't know who the fellow was, that he had never seen him before, and that he couldn't tell me what kind of automobile he was driving. He did not state to me why he was taking a cut-off or back road to get to Vinita. On the way down from Miami he told *he* that he had a wholesale and retail liquor dealer's stamp. I checked them at Mr. Brinegar's home in Vinita and found that wholesale liquor dealer's stamp No. 4173 and retail liquor dealer's stamp No. 164148 had been issued to Mr. V. T. Brinegar, 526 North Smith Street, Vinita, Oklahoma.

According to the addresses on the packages the Government's Exhibits 1, 2 and 3, were shipped to Joplin, Mis-

souri. On the package is Frankfort Distilling—Distributing Corporation for Southwest Missouri, Joplin, Missouri. We were not able to trace these cases because of the fact that all of the serial numbers had been removed from these packages. There was a serial number placed on these packages by the government storekeeper-gauger at the time this whiskey was put up, and could have been traced from the distiller to the distributor and from the distributor to the retailer, had those numbers been left on the packages. It is necessary to remove those numbers and destroy those numbers after the whiskey had been removed from the container. The whiskey together with the automobile are now in government storage here.

Cross-examination:

I saw Mr. Brinegar on March 4, 1947 in jail at Miami. Of my own knowledge I do not know when he was arrested. These cases of liquor were in a 1946 Ford Coupe, locked up [fol. 28] in storage in Miami, Oklahoma. I do not know whose car it was. I did not check the registration myself. The defendant told me he got the liquor in Oklahoma. He did not tell me that the man's car was broken down or that it had a flat tire or anything wrong. He said he was just driving down the road and the fellow stopped him. There is nothing on exhibits 1, 2 and 3 showing where they were sent to further than Joplin. These are the original packages from the distiller. They have not been opened. They are still sealed. I don't recall finding anything else besides the liquor in the car. There was probably some tools; I don't know. Mr. Smith stored the car. I just don't recall if I saw any wearing paraphernalia. I am not sure whether there were any blankets or any robes of any kind. There could have been, yes.

The Court: Mr. Reed, open that package and tell us what is in it, that exhibit 3; I believe it is.

A. Twenty-four pints of Four Roses, blended whiskey.

The Court: Tax paid?

A. Tax paid, yes, it has Missouri State stamp on it, also has the government revenue stamp.

On the way back to Tulsa I had a conversation with Mr. Brinegar and he said that the car was his.

The testimony of HENRY R. SMITH, offered by the Government and received in evidence, was in substance and effect as follows:

My name is Smith. I am an Investigator, Alcohol Tax Unit. I have been an Investigator since March 1, 1929. I was present with Mr. Reed when we went to Miami, for the purpose of taking into custody and seizure the defendant's automobile. I was present when Mr. Reed asked the defendant several questions. He did most of the questioning. That is at the Police Station—not what was said coming on in from down here. I drove the 1946 Ford Coupe to Tulsa, together with the liquor. I checked the purchase of the Ford, but not the record of the title. The motor company at Vinita sold this car to Brinegar. I can identify Govern- [fol. 29] ment's Exhibits 1, 2 and 3. That is the whiskey that was in the 1946 Ford Coupe that belonged to Brinegar.

Cross-examination:

I made an inventory of the contents of the defendant's automobile. In addition to Exhibits 1, 2 and 3 I found about nine other cases of whiskey. It is inventoried as to pints and fifths; 192 pints and 60 fifths or 36 gallons. That is just a part of it. Anything else in the car is inventoried on the form of inventory. It is on the windshield of the car and also on the records. I don't recall from memory what else was in the car; probably some tools—generally is. As to whether I found any tools in the car—generally is some. If there were some, I did, and they are on the inventory. I cannot tell this jury from memory whether or not I found them. I can't say from memory whether I found any wearing apparel or not. It seems to me like there was one blanket of some kind, that was left in the car.

I heard the defendant say that he contacted a man up about the Quapaw Bridge somewhere and purchased a cargo of whisky from him. That is in Oklahoma.

Q. Would you say that he did or did not say that the car was broken down, had a flat or was stopped on the highway?

A. I wouldn't say definitely. I don't think he said anything about any car being broken down.

Q. But you don't know definitely whether he did or not?

A. No.

The testimony of F. B. KIRKES, offered by the Government and received in evidence, was in substance and effect as follows:

My name is F. B. Kirkes. I have a general merchandise store located four miles southwest of Joplin on Highway 166. In connection with my general merchandise store I engage in the sale of whisky and other liquors.

I do not recall when Mr. Brinegar was arrested on this occasion: I heard about his arrest. I had a conversation [fol. 30] with him subsequent to his arrest. Exactly when I had that conversation I don't know but it was several days after the Alcohol Tax Unit men had been in my store and this gentleman came by and bought some gasoline and told me that they had arrested him for having some whisky in Oklahoma and had asked me if the Alcohol Tax Unit men had been there and asked me had I ever sold him whisky and I replied, I told them I had on two or three occasions sold him a few bottles or a case of whisky. That is all the conversation to the best of my recollection.

I don't recall ever selling him as much as a case and a half of whisky at any time; I have sold him a case. I have a retail liquor dealer's stamp and it does not permit me to sell more than five gallons at a time.

We always remove the stamps and serial numbers on a case of whisky when it is sold. Just cut around the number with an ice pick. The serial numbers on Government's Exhibit 1 might have been removed from that with an ice pick—as to identifying it as a case that was positively sold from my store, no, sir, I couldn't.

The testimony of JOHN A. MALSED, being recalled by the Government, and received in evidence, was in substance and effect as follows:

I know where the Southwest Missouri Liquor Company is located. It is located on South Main Street in Joplin, Missouri. The nature of their business is wholesale liquor dealers.

Mr. Hughes: If your Honor please, the Government rests.

MOTION FOR DIRECTED VERDICT AND DENIAL THEREOF

Mr. Seaton: Comes now the defendant and moves the Court for an order of acquittal.

The Court: Overruled.

Mr. Seaton: Exception.

[fol. 31] The testimony of VIRGIL T. BRINEGAR, offered by the defendant and received in evidence, was in substance and effect as follows:

My name is Virgil Thomas Brinegar. I live at Vinita, Oklahoma; prior to that time I lived at Hiwasse, Arkansas.

On the 3rd day of March, 1947, I was stopped by the Alcohol Tax Unit Investigators about three miles east of Quapaw, Oklahoma, about a half or a mile west of the bridge. That is about seven or eight miles from the Missouri line. I had been in Joplin, Missouri, that afternoon looking to trade in my car for a ton truck. I drove around the used car lots and couldn't see any trucks I wanted. I went down to the Market Square to see a man who is a dealer in fruit and vegetables, but he wasn't there. I left Joplin about three or four o'clock.

Q. Just tell the court and jury when you were stopped there what happened?

A. Well, they crowded me off to the ditch *any* anyway to where I couldn't go no farther; I had to stop. And they jumped out—Mr. Malsed, I believe, is the man came back there and said, "Old Brinegar" or "Mr. Brinegar," or something to that effect; he says, "How much whiskey have you this time?" I says, "Not too much." Well, he says, "Get out of there." So I got out. Then he says, "Open that up." I says, "It isn't locked." He went around and raised up the turtle, and looked, and he didn't see no whiskey. He said, "Where is that whiskey?" I said, "I don't know." Then he raised the seat, which is on hinges, he looked under there; he says, "About eleven cases." Then he says, "Just a minute." "Well," he says, "Where did you get this—Springfield?" I says, "No, I didn't get it at Springfield." He says, "Well, where did you get it?" I says, "I got it back up the road." And then he told me—then he says, "I will see where you got it," something like that. He searched every pocket of my

clothes, watch pocket, or everything thought he would find some bill or something, I guess, to show where I got it—I don't know. Anyway, he didn't find none. Then he said, "Get in the car and sit down." I got in the car and sat down. Then he radioed to another car, which was ahead, he said, "I have got a man with about eleven cases of whis- [fol. 32] key." This man come down there and they talked together and Mr. Moffett taken me to Miami. He told the others, he said they came in after me, he said, "We will be in Miami before supper."

I bought the liquor between the bridge and the Missouri line from a fellow on the side of the road with a flat casing. He asked $500.00, I thought that was a good buy, and I bought it. I had a liquor stamp that had been purchased from the government.

The liquor was all under that seat excepting one case that was on the floor board on the right-hand of me, down kind of back up under the dash board, like, and it was covered with a laprobe.

Q. Why did you have it covered with a laprobe?

A. Why anybody that seen it would taken it away from me, that is, a city officer, county officer—I would have been very foolish to haul that case of whiskey out there where people had seen it. That laprobe was a gray color, looks like a hide or something; the hair kind of stood out on it, although it isn't hair—it is imitation. It should be in the car yet if there haven't somebody made away with it.

There was no liquor in the turtle back.

Cross-examination:

I have been living in Vinita only a short time. I was not living there last September. My wife and child was living there at the time. The whiskey in the Ford was my whiskey. I bought it. As to telling the Agents that I was going to drink that whiskey, well, now I wouldn't say that; I might have joked something like that. I said I was going to drink it, something like that—of course, that is a joke. I intended to sell it. There are several main highways from Joplin to Miami to Vinita, Oklahoma. I went up on 66 to Baxter Springs, and went 166 into Joplin, I came back on this road, because I considered it nearer. I don't know exactly how many miles I would save by coming back on the diagonal. The road isn't paved. There was a fraction of

mud, not enough to interfere with driving; it is a gravel road. I really didn't think about the mud, and wasn't interfered with by the mud.

[fol. 33] If I see a man in trouble along the side of the road in daylight I usually stop. I have several times previously stopped when I saw a man with a flat tire. I have stopped quite frequently. This is not the first time that I have bought whiskey by the side of the road. I have sold some whiskey since June of 1946. I personally didn't think that I needed the wholesale dealer's stamp. I was talked into it. It cost $110.00 and that's quite a bit for me. I believe I could make the statement to the Court and jury that on that afternoon when I was up in Joplin I didn't go into any liquor store at all, and it would be true. I did not buy any whiskey at all on that day in Joplin. I had a pint of whiskey in the glove compartment, that I had opened and taken a drink out of. My side line is fruit peddling. It is a side line to farming; I was originally a farmer. I do not know the name of the man whom I met on the side of the road—never had seen him before. He was driving a Chevrolet, I believe, about a '38 or '39 model. Offhand I would say that he was about twenty-seven or twenty-eight years old. I never had an opportunity to show the Government's Agents the place where I purchased the whiskey. If they had gone back at the time they could have caught the man who sold it to me. When I told them that I had purchased it back there, they asked no particulars about it.

I can't say that I increased my speed when this car started to chase me, because that bridge was rough. I would have been silly to increase my speed there and hit that rough bridge. I don't think I had a bit of trouble going over the bridge. My rule in driving is to pick up speed before I hit a hill; whenever I get on to a bridge I try to pick up speed for those hills. At the time I didn't know that this car was chasing me. I did see it though as I looked in the glass; I seen the car was coming after me.

Q. When did you first realize that the Alcohol Tax Agents were trying to stop you?

A. Well, I didn't realize it for sure until the siren blowed; when they blowed why, then, I had a good idea what it was.

Q. Will you state to the court and jury why you didn't stop when that siren blew?

A. Well, I released and stopped as quick as I could, I suppose.

[fol. 34] Q. They forced you off the road didn't they?

A. Oh, yes, they done that; of course, I didn't know whether they were hijackers or who they were until the siren blowed, I didn't know who they was.

I have bought whiskey in Missouri in cases. The Government had got quite a bit of it now.

Redirect examination.

The liquor I referred to that I bought in Missouri that the Government has is in Missouri. It is that liquor that the Government has at Joplin. Yes, sir, they have some of my liquor there now. I paid for this whiskey in cash, $500.00. I transferred the whiskey from his car into mine there just beside the highway. The highway isn't traveled like 66; these isn't too much traffic on that road.

Mr. Seaton: Comes now, at the close of the case if Your Honor please, the defendant and moves the court for an order of acquittal.

The Court: Overruled.

Mr. Seaton: Exception.

Acknowledgment of Service

Now on this 15th day of July, 1947, the undersigned, Whit Y. Mauzy, United States Attorney, hereby acknowledges receipt of a copy of the Condensed and Narratgd Statement of Evidence on Defendant's Motion to Suppress and copy of the Condensed and Narrated Statement of Testimony Introduced on Trial and hereby agrees to the inclusion of same in the record on appeal.

Whit Y. Mauzy, United States Attorney; Kenneth G. Hughes, Assistant U. S. Attorney, Tulsa, Oklahoma; Attorneys for Plaintiff.

[fol. 35] IN UNITED STATES DISTRICT COURT

STATEMENT OF POINTS RELIED UPON ON APPEAL—Filed July 15, 1947

Comes now the above-named defendant, Virgil T. Brinegar and states his intention upon his appeal to the Circuit Court of Appeals for the Tenth Circuit, in the above case, to rely upon the following points:

I

That the Court erred in refusing to sustain defendant's motion to suppress the evidence (Tr., p. 27).

II

That the Court erred in allowing in evidence the testimony of the witnesses, John Malsed, Mark H. Creehan, John Reed, and Henry R. Smith, Investigators, Federal Alcohol Tax Unit, as to the finding and possession of tax-paid whiskey in defendant's automobile and erred in allowing in evidence government's Exhibits 1, 2 and 3, being cases of whiskey allegedly taken from defendant's car, over proper objection of defendant's counsel, for the reason that said testimony was based upon and said evidence obtained as a result of an unlawful arrest, and unlawful search and seizure without warrant or probable cause, and in violation of the Fourth and Fifth Amendments to the Constitution of the United States (Tr., pp. 32-51; 51-62; 62-73; 73-77).

III

That the Court erred in failing to sustain defendant's motion for judgment of acquittal at the close of the evidence offered by the Government (Tr., p. 83).

IV

That the Court erred in failing to sustain defendant's motion for judgment of acquittal at the close of all the evidence (Tr., p. 100).

V

That the repeal of the Oklahoma "Permit Law" Chapter 2, of Title 37, Oklahoma Statutes 1941, and Chapter 2 of Title 37, Session Laws 1945 (O.S. 1941, Secs. 41-48 inclu-
[fol. 36] sive), by the Legislature of the State of Oklahoma

by the enactment of Enrolled House Bill No. 254 approved and effective April 24, 1947, effectively withdrew the conditions necessary to the applicability of the Liquor Enforcement Act of 1936 (Act of June 25, 1936, c. 815, 49 Stat. 1928, 27 U.S.C.A. Sec. 233), making the Federal Act inoperative and requiring the dismissal of the information in this cause, for the reason that the Circuit Court of Appeals for the Tenth Circuit is without jurisdiction to affirm the sentence imposed or further proceed to enforce said Act in regard to this cause.

Paul O. Simms, Vinita, Oklahoma; Irvine E. Ungerman, Tulsa, Oklahoma, Attorneys for Defendant.

I, Whit Y. Mauzy, United States Attorney, hereby acknowledge receipt of a full, true and exact copy of the foregoing Statement of Points Relied Upon on Appeal.

Dated this 15th day of July, 1947.

Whit Y. Mauzy, United States Attorney; by Kenneth G. Hughes, Assistant United States Attorney for the Northern District of Oklahoma.

IN UNITED STATES DISTRICT COURT

DESIGNATION OF THE PORTIONS OF THE RECORD, PROCEEDINGS AND EVIDENCE TO BE INCLUDED IN THE RECORD ON APPEAL —Filed July 15, 1947

To the Clerk of the District Court of the United States for the Northern District, State of Oklahoma:

Defendant, Virgil T. Brinegar, respectfully requests that in preparing the transcript on appeal herein to be transmitted to the United States Circuit Court of Appeals for the Tenth Circuit, you include the following designated [fol. 37] papers, matters and orders and portions of the record, and evidence, which are to be printed and made part of the record on appeal in this cause.

1. Information for violation of Title 27, Sec. 223, U.S.C.A., filed March 5, 1947.

2. Defendant's Motion to Suppress Evidence, filed May 5, 1947.

3. Clerk's record entries and minute on Court's order overruling motion to suppress, May 9, 1947.

4. Clerk's record entry and minute on arraignment and plea—May 9, 1947.

(The clerk's minute of defendant's plea to the information—not guilty—May 9, 1947.)

5. Clerk's record entry and minute showing trial by jury of this cause on May 13, 1947.

6. Clerk's record entry and minute or verdict of guilty filed May 13, 1947.

7. Judgment and commitment (30 days and $100.00) entered May 16, 1947; filed May 20, 1947.

8. Notice of Appeal filed May 23, 1947.

9. Record entry showing notification to U. S. Attorney of Notice of Appeal.

10. Order Extending Time Within Which to File and Docket Appeal—filed June 25, 1947.

11. The testimony, proceedings and evidence adduced at the hearing on Defendant's Motion to Suppress: The Clerk is requested, instead of the question and answer testimony as it appears in the reporter's transcript of the witnesses, to include the Narrated Testimony, which is filed herewith.

12. The testimony, proceedings and evidence adduced at the trial. The Clerk is requested, instead of the question and answer testimony as it appears in the reporter's transcript of the evidence, to include the condensed and narrated testimony of the witnesses, which is filed herewith. (All other proceedings not included in the attached narration are to be omitted.)

13. Statement of Points on which Defendant Relies on Appeal.

[fol. 38] 14. This designation of record, etc., to be included in record on appeal.

Irvine E. Ungerman, Tulsa, Okla., Paul O. Simms, Vinita, Okla., Attorneys for Defendant.

The undersigned, Whit Y. Mauzy, United States Attorney, hereby acknowledges receipt of a copy of the above and foregoing Designation of Record on Appeal, and hereby agrees to same. Done this 15th day of July, 1947.

Whit Y. Mauzy, United States Attorney; Kenneth G. Hughes, Asst. U. S. Attorney, Tulsa, Oklahoma, Attorneys for Plaintiff.

Clerk's certificate to foregoing transcript omitted in printing.

And thereafter the following proceedings were had in said cause in the United States Circuit Court of Appeals for the Tenth Circuit:

Record Entry: Cause Argued and Submitted.

First Day, November Term, Wednesday, November 5th, A. D. 1947. Before Honorable Orie L. Phillips, Honorable Walter A. Huxman and Honorable Alfred P. Murrah, Circuit Judges.

This cause came on to be heard and was argued by counsel, Irvine E. Ungerman, Esquire, appearing for appellant, Kenneth G. Hughes, Esquire, appearing for appellee.

Thereupon this cause was submitted to the court.

Opinion.

(Argued November 5, 1947, Decided December 10, 1947)

Irvine E. Ungerman (Paul O. Simms and Charles A. Whitebook were with him on the briefs) for appellant.

Kenneth G. Hughes, Asst. U. S. Atty. (Whit Y. Mauzy, U. S. Atty., was with him on the brief) for appellee.

Before Phillips, Huxman, and Murrah, Circuit Judges.

Phillips, Circuit Judge, delivered the opinion of the court.

This is an appeal by Brinegar from a judgment of conviction for a violation of the Liquor Enforcement Act of 1936, 27 U.S.C.A. § 223.

The sole ground[1] for reversal urged is the denial of a motion to suppress evidence obtained by a search and seizure. At the hearing on the motion, Brinegar testified that on March 3, 1947, while driving a 1946 Ford coupe, he was apprehended by two investigators of the Alcohol Tax Unit about three miles east of Quapaw, Oklahoma; that the investigators searched the coupe and found a number of cases of whisky therein; that they seized the coupe and the

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[1] In their brief, counsel have contended that the conviction could not stand because of the repeal of 37 O. S. A. §§ 41-48, but that ground was abandoned at the oral argument.

whisky; that no search warrant was served upon him, and that he did not consent to the search; that one case of whisky was in the front seat, but was covered with a lap robe; that the remainder of the whisky was back of the front seat but could be exposed to view by raising the seat.

The following facts were established by the testimony of Malsed and Creehan, investigators for the Alcohol Tax Unit, at the hearing on the motion to suppress: On March 3, 1947, the investigators were working on the north boundary line of Oklahoma. Malsed knew Brinegar. He had arrested him on September 30, 1946, "for hauling liquor." On other occasions, he had seen him loading intoxicating liquor into an automobile at Joplin, Missouri, and for some time he had known him as a "liquor hauler." The investigators were in an automobile parked on the side of the road about one-fourth of a mile east of the Quapaw bridge. The road there runs east and west. The investigators observed a Ford coupe approaching from the east. Malsed recognized Brinegar as the driver of the coupe as it passed the point where the investigators were stationed. The coupe appeared to be heavily loaded. Upon passing the investigators, Brinegar increased his speed and the investigators started in pursuit of him. After it had crossed the bridge, the coupe began skidding on a curve and Brinegar slowed down. Up to the time the coupe skidded, the investigators, although traveling at the maximum speed of their automobile, were unable to gain on Brinegar. When Brinegar slowed down, the investigators drove up alongside of the coupe and Creehan sounded the siren. Brinegar then stopped on the side of the road. The investigators alighted from their automobile and Malsed asked Brinegar, "How much liquor have you got in the car this time?" Brinegar replied, "Oh, not so much." In response to further questioning, Brinegar stated there were about 12 cases of whisky in the coupe. Brinegar further stated that he had both a wholesale and a retail liquor dealer's stamp and asked if that would help him. The investigators then searched the car and found 13 cases of whisky. One case of Schenley's was on the floor to the right of the driver's seat in full view of the investigators; the remainder of the whisky, except a partially consumed bottle on the seat, was back of the seat. The

search in its entirety took place after the incriminating statements had been made by Brinegar. The investigators testified that such statements were made by Brinegar before they placed him under arrest.

The testimony of the investigators with respect to the statements made by Brinegar was not objected to on the ground that they were not voluntary nor on any other ground; neither did Brinegar testify or otherwise assert at the hearing on the motion to suppress that such statements were not voluntary. At the conclusion of the testimony, the trial court made an oral finding that such statements were voluntary and that finding was not challenged below. The motion to suppress was denied.

Whether there was a technical arrest before the statements were made by Brinegar may be doubted. In Jenkins v. United States, 10 Cir., 161 F. 2d 99, 101, the court said:

"To constitute an arrest, there must be an actual or constructive seizure or detention of the person, performed with the intention to effect an arrest and so understood by the person detained."

But we deem it unnecessary to decide whether there had been a technical arrest at the time the statements were made. At least, the investigators had pursued Brinegar, sounded their siren, and had caused him to stop, and they were questioning him as a suspect when the statements were made.

We are of the opinion that the facts within the knowledge of the investigators and of which they had reasonable trustworthy information prior to the time the incriminating statements were made by Brinegar were not sufficient to lead a reasonably discreet and prudent man to believe that intoxicating liquor was being transported in the coupe, and did not constitute probable cause for a search.[2] Neither were such facts sufficient, in our opinion, to induce an ordinarily prudent and cautious person, under the circumstances, to believe in good faith that Brinegar had committed a felony

[2] Von Patzoll v. United States, 10 Cir., 163 F. 2d 216, 220, and cases there cited.

so as to constitute probable cause for the investigators arresting Brinegar without a warrant.[3] However, the statements made by Brinegar, together with the facts theretofore known by the investigators, if the investigators were warranted in acting upon such statements, were sufficient to lead a reasonably discreet and prudent man to believe that intoxicating liquor was being transported by Brinegar into Oklahoma and, since it was not practicable for the investigators to obtain a search warrant, justified the search and seizure of the whisky and the arrest of Brinegar.

The question presented then is whether the investigators, having sufficient information to suspect Brinegar, but not sufficient information to constitute probable cause for a search of the coupe and the arrest of Brinegar, could, after stopping him and interrogating him with respect to whisky in the coupe, lawfully act upon the information obtained as a basis for probable cause for the search and seizure.

If the statements made by Brinegar to the investigators could have been properly introduced in evidence against Brinegar at a trial on the criminal charge, then we think they, with the other facts known to the investigators, constituted adequate basis for probable cause for search and seizure by the investigators.

A confession or an incriminating statement made by a person is not involuntary merely because made while such person is in custody after arrest.[4]

"The mere questioning of a suspect while in the custody of police officers is not prohibited either as a matter of common law or due process." Neither will the fact that the arrest, under which the person was taken into custody,

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[3] Papani v. United States, 9 Cir., 84 F. 2d 160, 163;
Wisniewski v. United States, 6 Cir., 47 F. 2d 825;
Stacey v. Emery, 97 U. S. 642, 645;
United States v. One 1941 Oldsmobile Sedan, 10 Cir., 158 F. 2d 818, 819.

[4] Pierce v. United States, 160 U. S. 355, 357;
Wan v. United States, 266 U. S. 1, 14;
Lyons v. Oklahoma, 322 U. S. 596, 601.
Lisenba v. California, 314 U. S. 219, 240.
Cf. United States v. Mitchell, 322 U. S. 65.

[5] Lyons v. Oklahoma, 322 U. S. 596, 601.

was illegal, in and of itself render a confession or an incriminating statement involuntary.[6] The test is whether, under all the facts and circumstances, the confession or incriminating statement was voluntarily made.[7]

We do not regard McNabb v. United States, 318 U. S. 332, to hold otherwise. In United States v. Mitchell, 322 U. S. 65, 67, the court said:

"In the circumstances of the McNabb case we found such an appropriate situation, in that the defendants were illegally detained under aggravating circumstances; one of them was subjected to unremitting questioning by half a dozen police officers for five or six hours and the other two for two days. We held that 'a conviction resting on evidence secured through such a flagrant disregard of the procedure which Congress has commanded cannot be allowed to stand without making the courts themselves accomplices in willful disobedience of law.' * * * Inexcusable detention for the purpose of illegally extracting evidence from an accused, and the successful extraction of such inculpatory statements by continuous questioning for many hours under psychological pressure, were the decisive features in the McNabb case which led us to rule that a conviction on such evidence could not stand."

Concluding, as we feel we are compelled to do, because of the findings of the trial court and the facts disclosed by this record that the statements made by Brinegar were not coerced by the action of the officers, but were voluntarily made, we hold that such statements would have been admissible against Brinegar on a trial on the criminal charge

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[6] Gilmore v. State, 3 Okl. Cr. 434, 106 P. 801, 803.
People v. Klyczek, 307 Ill. 150, 138 N. E. 275, 277;
People v. Vince, 295 Ill. 419, 129 N. E. 193, 195;
Hicks v. State, ——Ind.——, 11 N. E. 2d 171, 177;
Quan v. State, ——Miss.——, 188 So. 568, 569;
State v. Hoskins, ——Mo.——, 36 S. W. 2d 909, 910;
Balbo v. People, 80 N. Y. 484, 499;
People v. McFarland, 386 Ill. 122, 53 N. E. 2d 884, 887.
See, also, State v. Zukauskas, 132 Conn. 450, 45 A. 2d 289, 293;
Sykes v. United States, C.C.A.D.C., 143 F. 2d 140.
Cf. R. v. Thornton, 1 Moody, C.C. 27.

[7] Young v. United States, 5 Cir., 107 F. 2d 490, 492;
Ruhl v. United States, 10 Cir., 148 F. 2d 173, 176;
Bram v. United States, 168 U. S. 532, 542.

and that such statements, together with other facts known to the investigators, constituted probable cause for a search of the coupe; and, since it was impracticable for the officers to obtain a search warrant, that the search was lawful.[3]

Affirmed.

Huxman, United States Circuit Judge, dissenting:

I think the fair interpretation of the evidence is that Brinegar's reply to the officer's inquiry as to how much liquor he had was "Not too much." Brinegar testified that his reply was "Not too much," while Malsed, the officer who asked the question, testified that Brinegar replied, "Not so much," or words to that effect. But I attach no particular significance to the exact words of his reply. In my opinion, the decision in this case does not turn upon whether the statement by Brinegar, after he was stopped and interrogated by the Alcohol Tax Unit agents, was voluntary or involuntary, or whether it was of such an unequivocal nature as to constitute probable cause for believing that he had liquor which he was transporting in violation of the Federal Law. By the admission of the agents themselves, they did not pursue this car for the purpose of arresting Brinegar. Their testimony makes that very clear. They had no warrant for his arrest. They did not see him commit an act of law violation which would have warranted them in arresting him without a warrant, and they testified that they did not arrest him for fully fifteen minutes after they had stopped him, interrogated him, and found the whisky. What for then did they pursue him down the road with their siren screeching and crowd him off the highway, place him under restraint, and make it impossible for him to proceed. There can only be one answer—to ascertain whether he had whisky. Ascertaining this constituted a search. Is there any one so naive as to believe that if he had answered that he had no whisky, that they could have apologized, begged his pardon for having violated his constitutional rights as well as their oath

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[3] See Morgan v. United States, 10 Cir., 159 F. 2d 85.

of office to respect the Constitution, and permitted him to proceed. That they would have searched his car in any event is borne out by the position the Government takes in this appeal, that the condition of the car at the time they first observed it, plus the fact that Brinegar had the reputation with the Alcohol Tax Unit agents of dealing in liquor, constituted probable cause warranting a search without a warrant. In other words, they intended to search this car, and the search was on when the chase began and Brinegar was crowded off the road and prevented from going his lawful way as far as the Alcohol Tax unit agents were concerned.

In Nueslein v. District of Columbia, 115 F. (2d) 690, a taxicab had struck a parked car. The officers found the taxi parked about a block and a half from the scene of the accident; they also found the identifying license of the driver. They either opened the door of the house where the car was parked or entered the open door and called out the name of the driver of the cab. He answered from upstairs and stated that he would come down. When he came down, the officers interrogated him and he admitted that he had driven the car and had a drink of beer prior thereto. The court held that the officers were engaged in a search of the premises.

In U. S. v. Hanley, 50 F. (2d) 465, the agents stopped a truck, ordered the driver to pull over to the curb, then boarded the truck to interrogate him and obtained an admission that he had a load of beer. The court held that this constituted a search. The facts in this case are indistinguishable in principle from those in these two cases. In the Hanley case, the truck was stopped and boarded for the purpose of interrogating the driver. Here it was stopped, forced to the roadside and surrounded for the purpose of interrogating the driver. As the court said in the Nueslein case when the officers entered the house, "They were just investigating. They were still legally investigating when the defendant told them that he was driving the cab at the time of the accident." So here the officers were illegally investigating when they pursued the car, forced it to the side of the road, compelled it to stop, and interrogated the driver. If the acts of the officers in

the Nueslein case constituted a search, the acts of the officers in this case likewise constituted a search.

There is a line of case distinguishable upon the facts from the above cases. In Poulas v. U. S., 95 F. (2d) 412, the defendant was sitting in his parked car when officers came up and questioned him, and he admitted that he had whisky. In Jenkins v. U. S., 161 F. (2d) 99, the officers followed a truck until it stopped, then drew up behind it, got out and questioned the occupant, and obtained an admission from him. In none of the cases did the officers pursue the defendant under the belief that they had a probable cause for searching the automobile without a warrant or under circumstances justifying the conclusion that they were pursuing or stopping the defendant for the purpose of searching his car.

The facts in the Morgan case are not nearly as strong on the question of pursuit as they are in this case. But in any event, this precise point was not raised or decided in that case. The only question discussed and the only thing said was that the admission was voluntary and constituted probable cause for the search. Whether the result of the search could be used as evidence because obtained in violation of the Fourth Amendment, was not alluded to nor decided in that case.[1] The Morgan case is no authority for the proposition that a voluntary admission, obtained while officers were engaged in a search in violation of the Fourth Amendment, is admissible.

As pointed out by the present Chief Justice of the Supreme Court, who wrote the opinion in the Nueslein case, there is a conflict between the Federal Rule and the common law rule, as well as the rule of a number of State courts as to the admissibility of voluntary statements obtained while officers were engaged in conducting a search in violation of the Fourth Amendment. Under the Federal Rule, such statements are inadmissible.[1] The admission upon which the Government relies was obtained while agents were engaged in an illegal search of Brinegar's car. The right

[1] In addition to the Nueslein case, see also U. S. v. Setaro, 37 F. (2d) 134; In re Oryell, 28 F. (2d) 639; In re Fried, 161 F. (2d) 453.

of a citizen to be secure from unreasonable searches is not limited to homes. It applies as well and with equal force to "their persons, . . . papers and effects."

I subscribe fully to the philosophy of the Nueslein case. The personal guarantees of the Constitution are sacred rights. They are the things for which men have died throughout the centuries. Without them in the Constitution, it could not have been adopted and our present system of Government could not have been formed. Whenever a violation of one of these rights is involved, all reasonable presumptions should be resolved against one charged with a violation thereof and the burden should be placed upon him to bring his conduct clearly within the Constitutional power.[2]

Of course, officers should not be unduly restricted in their efforts to enforce the law, but in no instance are they warranted in violating constitutional immunities in their efforts to enforce the law. Having taken an oath to uphold the law, they should respect the rights of citizens guaranteed thereunder and should not, in their zeal, violate such rights. There is no conduct more unwarranted or offensive than to have an officer, who has taken an oath to uphold the law, pursue a citizen down the road, force him to the ditch, and interrogate him, all without probable cause, in the hope that he may obtain an admission ordinarily admissible under the Fifth Amendment, while engaged in violation of the Fourth Amendment.

I would, accordingly, reverse and remand with direction to sustain the motion to suppress.

Judgment.

Fifteenth Day, November Term, Wednesday, December 10th, A. D. 1947. Before Honorable Orie L. Phillips, Honorable Walter A. Huxman and Honorable Alfred P. Murrah, Circuit Judges.

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[2]Nueslein v. District of Columbia, 115 F. (2d) 690;
Gibson v. U. S., 149 F. (2d) 381;
U. S. v. Ruffner, 51 F. (2d) 579;
In re Fried, 68 F. Supp. 961.
Go-Bart Co. v. U. S., 282 U. S. 344

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Northern District of Oklahoma and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this court that the judgment and sentence of the said district court in this cause be and the same is hereby affirmed.

It is further ordered by this court that Virgil T. Brinegar, appellant, surrender himself to the custody of the United States Marshal for the Northern District of Oklahoma, in execution of the judgment and sentence imposed upon him, within ten days from and after the date of the filing of the mandate of this court in said district court.

On December 17, 1947, an order was entered granting a ten day extension of time for appellant's petition for rehearing.

PETITION FOR REHEARING.

Order Denying Petition for Rehearing.

Twenty-eighth Day, November Term, Friday, January 2nd, A. D. 1948. Before Honorable Orie L. Phillips, Honorable Walter A. Huxman and Honorable Alfred P. Murrah, Circuit Judges.

This cause came on to be heard on the petition of appellant for a rehearing herein and was submitted to the court.

On consideration whereof, it is now here ordered by the court that the said petition be and the same is hereby denied, Honorable Walter A. Huxman, Circuit Judge, dissenting.

On January 8, 1948, the mandate of the United States Circuit Court of Appeals, in accordance with the opinion and judgment of said court, was issued to the United States District Court.

On January 20, 1948, an order was entered recalling the mandate and staying the reissuance of the mandate for thirty days.

Clerk's Certificate.

United States Circuit Court of Appeals, Tenth Circuit.

I, Robert B. Cartwright, Clerk of the United States Circuit Court of Appeals for the Tenth Circuit, do hereby certify the foregoing as a full, true, and complete copy of the designated transcript of the record from the District Court of the United States for the Northern District of Oklahoma, and full, true, and complete copies of certain pleadings, record entries and proceedings, including the opinion (except full captions, titles and endorsements omitted in pursuance of the rules of the Supreme Court of the United States) had and filed in the United States Circuit Court of Appeals for the Tenth Circuit in a certain cause in said United States Circuit Court of Appeals, No. 3518, wherein Virgil T. Brinegar was appellant, and United States

of America was appellee, as full, true, and complete as the originals of the same remain on file and of record in my office.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Tenth Circuit, at my office in Denver, Colorado, this 23rd day of January, A. D. 1948.

(Seal, U. S. Circuit Court of Appeals, Tenth Circuit)

ROBERT B. CARTWRIGHT,
Clerk of the United States Circuit Court of Appeals, Tenth Circuit.

[fol. 63] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed March 8, 1948

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Tenth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[Endorsed on Cover:] Enter Leslie L. Canner. File No. 52781 U. S. Circuit Court of Appeals, Tenth Circuit. Term No. 551. Virgil T. Brinegar, Petitioner, vs. The United States of America. Petition for writ of certiorari and exhibit thereto. Filed January 27, 1948. Term No. 551 O. T. 1947.

No. [redacted] 12

In the Supreme Court of the United States

October Term 194[redacted]

VIRGIL T. BRINEGAR, *Petitioner,*

vs.

UNITED STATES OF AMERICA, *Respondent.*

Petition for Writ of Certiorari, and Brief in Support Thereof.

LESLIE L. CONNER,
Oklahoma City, Oklahoma,
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Tulsa, Oklahoma,
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Tulsa, Oklahoma,
Of Counsel.

INDEX.

TABLE OF CASES.

STATUTES.

IN THE SUPREME COURT OF THE UNITED STATES.

October Term, 1947.

No. .....

VIRGIL T. BRINEGAR, *Petitioner,*

vs.

UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR *CERTIORARI* TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT.

To the Honorable, The Supreme Court of the United States:

Comes now Virgil T. Brinegar, hereinafter styled petitioner, and, applying for a writ of certiorari to the United States Circuit Court of Appeals for the Tenth Circuit, respectfully shows:

A.

Opinion Below.

The opinion of the Circuit Court of Appeals appears in the record (R. ...). The judgment and sentence of the District Court also appears in the record (R. 4).

B.

Jurisdiction.

The decision of the Circuit Court of Appeals, here sought to be reviewed, was originally determined on December 10, 1947. A petition for rehearing was timely filed, and was denied on the 2nd day of January, 1948.

The jurisdiction of this court is invoked under Sec. 240(a) of the Judicial Code, as amended, Title 28, Sec. 347(a) U. S. C.

C.

Questions Presented.

1.

Whether a search and seizure, without a search warrant, commenced by Federal Agents without probable cause, can be validated so as to make admissible the evidence thereby obtained, where subsequent to an unlawful pursuit and forcible stopping, but during such illegal search the officers obtain an incriminating admission from the defendant through chance, interrogation, or the force and compulsion inherent in the attending circumstances.

2.

Whether a voluntary statement obtained while Federal Agents are engaged in conducting a search, without a warrant, and without probable cause, in violation of the Fourth Amendment to the Constitution of the United States, is admissible in evidence against the defendant in a subsequent criminal case arising from such illegal search.

D.

Summary Statement of Matter Involved.

1.

On March 5, 1947, an Information was filed in the United States District Court for the Northern District of Oklahoma (Criminal, No. 11,207) charging petitioner, Virgil T. Brinegar, with a violation of the Liquor Enforcement Act of 1936, Title 27, U. S. C., Sec. 223, a misdemeanor (R. 2, 3). On May 5, 1947, petitioner duly filed his motion to suppress the evidence on the ground that it was obtained as a result of an unlawful arrest, and unlawful search and seizure, without a warrant, and in violation of the Fourth Amendment to the Constitution. (R. 2) Upon hearing duly had the court overruled the motion to suppress on May 9, 1947. (R. 2, 3)

Thereupon, on arraignment, petitioner entered his plea of not-guilty, and the cause was tried to a jury, which returned a verdict of guilty as charged, and on May 16, 1947, the court pronounced judgment and sentence of thirty days' imprisonment, and $100.00 fine. (R. 2, 3, 4)

2.

The facts introduced in evidence were briefly the following:

On March 3, 1947, petitioner was driving his 1946 Ford Coupe westerly toward Quapaw, Oklahoma. It was about 6:00 o'clock p. m. and petitioner was returning to his home in Vinita, Oklahoma, from Joplin, Missouri. (R. 31-32) At a point about five miles west of the Missouri line, about a quarter of a mile east of the Quapaw bridge, two Alcohol Tax Unit Investigators, Mr. Malsed and Mr. Creehan, were lying in wait in their car. (R. 8, 11, 17, 19) Their car was facing west, but Creehan "looked through the rear vision

mirror and saw a car rounding the curve about a mile east" of their position. (R. 11) There was nothing untoward in the presence of a car on the highway, nor in the approach of petitioner's car. "As this car passed" both Malsed and Creehan noted that the car appeared to be "heavily loaded"; but there was no testimony whatsoever that the springs were sagging, or that the back end was down, or any similar circumstances (R. 8, 11, 12), and the trial court held that the appearance of the car was not enough to constitute probable cause. (R. 9, 10, 13) Malsed, who had previously arrested Brinegar on September 30, 1946, recognized petitioner when he passed, informed Creehan, "That is Brinegar," and on the sounding of that "charge" the officers immediately gave chase. (R. 8, 11, 22) Petitioner then increased his speed and after a movie-thriller run of about a mile, over rough, curving roads at a speed of sixty miles per hour, the officers opened their siren, crowded petitioner off of the road, into a ditch *and forced him to stop!* (R. 8, 9, 11, 18, 20, 23, 31, 34)

Petitioner first realized that the Federal Agents were trying to stop him when "the siren blowed," and upon such realization he stopped as quickly as he could. (R. 33) He was forced to stop under the most extreme compulsion: driving, so the Federal Agents testified at a speed of up to sixty miles per hour, they drove along side of petitioner's car, "forced him off of the road," into the ditch and prevented his forward progress by bringing their car to a stop at the side of and to the front of petitioner's car, thereby forming a barricade. (R. 9, 11, 20, 23, 24, 31, 34)

Malsed got out of the right side of the investigator's car, and Creehan jumped from the left side and they both started back to petitioner's car. (R. 9, 24, 25) Malsed said,

"Hello Brinegar, how much liquor have you got in the car?" (R. 9, 10, 19) To which Brinegar replied, "Not too much." (R. 7, 9, 10, 19, 20) Simultaneously therewith and while both officers were still approaching petitioner's car, Creehan, who testified that they "make it a point" to get the driver out of his car, so that he can't get away with it, ordered or "requested" Brinegar to get out of his car. (R. 25) Brinegar complied. (R. 20, 31)

With the door of the car thus opened the officers testified they were able to see a case of whisky in the front of the car (R. 9, 20, 24) and subsequent search revealed some twelve or thirteen cases of whisky contained and concealed in a compartment under and back of the seat. (R. 9, 20, 23) The record is clear that prior to the stopping of the car the officers could not see any whisky, and had no personal knowledge that Brinegar was in fact transporting any whisky. (R. 24) According to the officers, petitioner was placed "under arrest" after they searched the car and discovered the whisky. That was fully fifteen minutes or more after they had originally stopped the car. According to Officer Malsed the "formal arrest" was then made by advising petitioner that, "We are taking you in." (R. 9, 21, 22) Creehan was of the opinion that no formal arrest was ever made; petitioner being merely advised, "Well, you get in the car, come along with us." (R. 23, 24) Brinegar, the car and the whisky were all taken into custody on the spot. (R. 21, 23)

The Federal Investigators admittedly had no warrant for the arrest of petitioner, had no search warrant for the search and seizure, and, of course, served no warrant upon petitioner. (R. 7, 10, 11)

3.

An appeal was duly taken from the decision of the District Court to the Circuit Court of Appeals for the Tenth Circuit and there docketed as Case No. 3518.

The opinion and judgment of the Circuit Court of Appeals for the Tenth Circuit was entered on the 2nd day of January, 1948. This application for writ of certiorari is timely filed.

4.

On the appeal the United States Circuit Court of Appeals for the Tenth Circuit, (PHILLIPS, HUXMAN and MURRAH, Circuit Judges sitting) affirmed the trial court in a 2 to 1 decision. The majority of the court, in an opinion by PHILLIPS, J., held:

> First: That the facts within the knowledge of the investigators prior to the time the incriminating statements were made, were not sufficient as basis for and *did not constitute probable cause for a search.*
>
> Second: That said facts were *insufficient* to constitute the basis for or provide probable cause for the arrest of petitioner without a warrant.
>
> Third: That under the circumstances disclosed by the record, the statements made by petitioner were not coerced by the action of the officers, but were voluntarily made.
>
> Fourth: That the search was commenced and made *after* the pursuit, the interrogation and the admissions made.
>
> Fifth: That notwithstanding the absence of probable cause for search at the inception of pursuit, the subsequent voluntary admission of petitioner, made after being unlawfully stopped and interrogated with respect to whisky, *could relate back and be added to*

the insufficient information previously had by the investigators so as to constitute probable cause for the search and seizure.

Sixth: That a voluntary admission and evidence obtained while officers were engaged in conducting a search without probable cause, is admissible in evidence.

In an incisive and well-reasoned dissenting opinion HUXMAN, J., lays it down:

First: There was *clearly no probable cause* warranting the search, the seizure or the arrest of petitioner without a warrant.

Second: That the search began and was continuing from the commencement of the pursuit of petitioner by the Federal Officers. That the pursuit was undertaken solely for the purpose of searching petitioner's car and with the express intent of consummating such search.

Third: That the acts of the officers in pursuing the car, forcing it to the side of the road, compelling it to stop and interrogating the driver *constituted a search.*

Fourth: That the admission upon which the Government relies was obtained while the Federal Agents were engaged in an illegal search of petitioner's car.

Fifth: That an admission against interest or other evidence obtained while Federal Agents are engaged in conducting an illegal search, in violation of the Fourth Amendment, is inadmissible in evidence.

E.

Reasons Relied on for Allowance of the Writ.

First. The opinion of the Tenth Circuit Court of Appeals in this case is in direct conflict with the opinions of

this court in *Carroll* v. *United States*, 267 U. S. 28, 45 S. Ct. 280, 29 L. ed. 543, 39 A. L. R. 790; *Amos* v. *United States*, 255 U. S. 313, 41 S. Ct. 266, 65 L. ed. 654; and *United States of America* v. *Michael Di Re*, 16 L. W. 4071, decided January 5, 1948. The opinion is also in conflict with the decision of the Circuit Court of Appeals for the Fifth Circuit in the case of *Ray* v. *United States*, 84 F. (2d) 655.

That in its opinion the Tenth Circuit Court of Appeals has decided a question involving the constitutional rights, privileges and immunities of petitioner under the Constitution of the United States in a way probably in conflict with applicable decisions of this court; it has, by its opinion, announced a rule of law which tends to abrogate and nullify the rights, privileges and immunities of this petitioner under the Fourth and Fifth Amendments to the Constitution. It has sanctioned a course of conduct on the part of Federal Officers, which invades and denies the basic civil liberties of the citizen, so as to call for an exercise of this court's power of supervision.

Second. The opinion of the Tenth Circuit Court of Appeals in this case is in direct conflict with the decision of the Circuit Court of Appeals for the District of Columbia in the case of *Nueslein* v. *District of Columbia*, 115 F. (2d) 690; and the opinion of the Circuit Court of Appeals for the Fifth Circuit in the case of *Moring* v. *United States*, 40 F. (2d) 267. [See also the decision in the case of *United States* v. *Hanley*, 50 F. (2d) 465 (D. C. N. Y.)]

The opinion of the Tenth Circuit Court of Appeals in this case has decided an important question of Federal constitutional law in a manner in conflict with decisions of other Circuit Courts of Appeals on the same matter, which constitutional question has not been, but because of its extreme

importance to all citizens of these United States, and to the Government should be settled by a decision of this court.

The Circuit Court of Appeals opinion lays down an intolerable rule which authorizes Federal Alcohol Tax Unit Agents, arbitrarily, without warrant or judicial authorization, without justification or probable cause, to pursue and forcibly stop at random any citizen using the public highways, upon the chance of discovering in his vehicle, liquor, to be used as evidence against him, and to furnish the basis for a criminal prosecution. Such a rule is contrary to the many decisions of this court and the decisions of other Circuit Courts of Appeals. If given credence and followed generally by other Circuit Courts of Appeals it will effectively undermine public confidence in all law enforcement and destroy in large measure the guarantees against unreasonable searches and seizures provided for by the Fourth Amendment to the Constitution.

The majority opinion further determines a problem of grave and general importance under the Fifth Amendment to the Constitution. Its holding is directly contrary to the opinion of Mr. Justice Vinson in the case of *Nueslein* v. *District of Columbia*, 115 F. (2d) 690, holding that voluntary statements obtained while officers are engaged in conducting a search in violation of the Fourth Amendment, under the Federal Rule, are inadmissible. We believe that this decision of the court below is probably in conflict with the opinion of this court. This is a matter of fundamental constitutional law which deserves pronouncement by this court.

Wherefore, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this

Honorable Court directed to the United States Circuit Court of Appeals for the Tenth Circuit commanding that court to certify and send to this court for its review and determination on a day certain to be therein named, the full proceedings in this case, Numbered 3518, *Virgil T. Brinegar, Appellant,* v. *United States of America, Appellee,* and that said judgment of the Tenth Circuit Court of Appeals may be reversed by this Honorable Court and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and proper; and your petitioner will ever pray.

VIRGIL T. BRINEGAR,
Petitioner,

By LESLIE L. CONNER,
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IRVINE E. UNGERMAN,
Tulsa, Okla.,
Counsel for Petitioner.

CHARLES A. WHITEBOOK,
Tulsa, Oklahoma,
Of Counsel.

IN THE SUPREME COURT OF THE UNITED STATES.

October Term, 1947.

No. .....

VIRGIL T. BRINEGAR, *Petitioner,*

vs.

UNITED STATES OF AMERICA, *Respondent.*

BRIEF IN SUPPORT OF PETITION FOR WRIT OF *CERTIORARI**.

I.

The Opinion of the Court Below.

The opinion of the Circuit Court of Appeals for the Tenth Circuit has not yet been officially reported. It appears in the transcript of the record of the Circuit Court of Appeals proceedings.

*Subsequent to the delivery of this Brief in Support of Writ to the printer, on this 20th day of January, 1948, counsel were privileged to review the recent opinion of this court in *United States of America* v. *Michael Di Re*, decided on January 5, 1948, and reported in 16 L. W. 4071. (The case is not yet officially reported.) Due to limitation of time for the filing of this application we are unable to fully discuss this case, as it relates to the opinion of the Circuit Court of Appeals. We believe the decision to be here applicable and *that it requires the reversal* of the opinion of the lower court. As to the Oklahoma law of arrest, please see: 22 Okla. Stats. Ann., Sec. 186 ("Arrest is the taking of a person into custody, that he may be held to answer for a public offense."); 22 Okla. Stats. Ann., Sec. 190 ("An arrest is made by an actual restraint of the person of the defendant, or by his submission to the custody of the officer."); and the cases of *Hoppes* v. *State*, 105 P. (2d) 433, and *Evans* v. *State*, 110 P. (2d) 621. We submit that Brinegar was under arrest at the time the officers stopped him. The question was properly raised and determined contrary to our contentions as will be seen from the opinion of the court below. We respectfully submit that both as to the question of "arrest" and of "search and seizure" the opinion of the Circuit Court of Appeals is directly contrary to the *Di Re* decision.

II.

Jurisdiction.

1. The writ of certiorari is applied for under Rule 38 of this court and jurisdiction is invoked under Sec. 240(a) of the Judicial Code, as amended, Title 28, U. S. C., Sec. 347(a), and is the proper remedy.

Ex parte Lau Ow Bew, 141 U. S. 583.

2. The opinion of the Circuit Court of Appeals for the Tenth Circuit was filed on December 10, 1947. Petition for rehearing was duly filed and denied January 2, 1948. The opinion of the court was entered the same day.

III.

Statement of the Case.

A full statement of the case has been given under "A" in the petition for writ of certiorari, *supra*, and in the interest of brevity, is not here repeated.

IV.

Specification of Errors.

(a)

First. The Circuit Court of Appeals erred in holding that a search and seizure, without a search warrant, commenced by Federal Agents without probable cause, can be validated so as to make admissible the evidence thereby obtained, where subsequent to an unlawful pursuit and forcible stopping, but during such illegal search the officers obtain an incriminating admission from the defendant through chance, interrogation or the force and compulsion inherent in the attending circumstances.

(b)

Second. The Circuit Court of Appeals erred in hold-

ing that a voluntary statement obtained while Federal Agents are engaged in conducting a search, without a warrant, and without probable cause, in violation of the Fourth Amendment to the Constitution of the United States is admissible in evidence against the defendant in a subsequent criminal case arising from such illegal search.

(c)

Third. The Circuit Court of Appeals erred in permitting the Federal Alcohol Tax Unit Agents, arbitrarily, without warrant, without justification and without probable cause, to pursue and forcibly stop, at random, any citizen upon the public highways, and to subject the citizen to such inconvenience and indignity, upon the chance of discovering in his vehicle, liquor, to be used as evidence against him, and to furnish the basis for a criminal prosecution.

V.

ARGUMENT.

(1)

Fundamental to the American concept of "Democracy" are the rights and immunities of the citizen proclaimed by the Bill of Rights. Of these, the security guaranteed to all American citizens by the Fourth and Fifth Amendments —freedom from fear of oppression—is basic to the enjoyment of liberty. These Amendments have been termed "the bulwark of our Constitution." Their origin and purposes have been the subject of great inspiration and fundamental teachings by both this court and the several Circuit Courts of Appeals:

Amos v. *United States*, 255 U. S. 313, 41 S. Ct. 266, 65 L. ed. 654;

Silverthorne Lumber Co. v. *United States*, 251 U. S. 385, 40 S. Ct. 182, 64 L. ed. 319;

Weeks v. *United States*, 232 U. S. 383, 34 S. Ct. 341, 58 L. ed. 652;

Adams v. *New York*, 192 U. S. 585, 24 S. Ct. 372, 48 L. ed. 575;

Boyd v. *United States*, 116 U. S. 616, 6 S. Ct. 524, 29 L. ed. 746;

Nueslein v. *District of Columbia*, 115 F. (2d) 690 (C. C. A., D. C.).

Ever since the *Boyd* case, it has been the unquestioned policy of this court to hold paramount the safeguarding of constitutional rights as against effecting punishment of all misdemeanants! As Mr. Justice VINSON so aptly stated:

> "To us the interest of privacy safeguarded by the amendment is more important than the interest of punishing all those guilty of misdemeanors."
>
> —*Nueslein* v. *District of Columbia, supra.*

Until the opinion of the Tenth Circuit Court of Appeals in this case was handed down we had thought that as a matter of "hornbook" law it was imperative that a search and seizure without warrant be made upon "probable cause" then existing or it was unreasonable within the meaning of the constitutional interdiction and unlawfully made. *Carroll* v. *United States*, 267 U. S. 132, 45 S. Ct. 280, 69 L. ed. 543, 39 A. L. R. 790; *Pearson* v. *United States*, (C. C. A. 10) 150 F. (2d) 219; *United States* v. *One 1937 Model Studebaker Sedan*, (C. C. A. 10) 96 F. (2d) 104.

Neither had we any question but that in establishing "probable cause"—that is, the circumstances necessary to lead a reasonably discreet and prudent man to believe that liquor is illegally being transported in the automobile to be

searched—*the officer was limited to the knowledge with which he initiated the search;* that he *could not* sustain the search upon the basis of the discovery of that which he seeks in an otherwise illegal search. The vindication of his suspicion, the cases taught, will not suffice; the discovery of the contraband proves that his suspicion was well founded, but does not in any manner retroactively validate or justify the illegal search. *Amos* v. *United States,* 255 U. S. 313, 41 S. Ct. 266, 65 L. ed. 654; *Byars* v. *United States,* 273 U. S. 28, 47 S. Ct. 248, 71 L. ed. 520; *Carroll* v. *United States,* 267 U. S. 132, 45 S. Ct. 280, 69 L. ed. 543, 39 A. L. R. 790; *Wisniewski* v. *United States,* (C. C. A. 6) 47 F. (2d) 825; *Pearson* v. *United States,* (C. C. A. 10) 150 F. (2d) 219; *United States* v. *O'Connell,* (D. C. N. Y.) 43 F. (2d) 1005; *Nueslein* v. *District of Columbia, supra; Henderson* v. *United States,* (C. C. A. 4) 12 F. (2d) 528.[1]

Nor did we believe there was any question but that if the search without a warrant was commenced without probable cause in violation of the Fourth Amendment, the admissions or evidence procured thereby could not be introduced as evidence against the defendant. *Gouled* v. *United States,* 255 U. S. 298, 65 L. ed. 647, 41 S. Ct. 261; *Amos* v. *United States,* 255 U. S. 313, 65 L. ed. 654, 41 S. Ct. 266; *Nueslein* v. *District of Columbia,* (C. C. A. D. C.) 115 F. (2d) 690; *United States* v. *Hanley;* (D. C. N. Y.) 50 F. (2d) 465; *Moring* v. *United States,* (C. C. A. 5) 40 F. (2d) 267; *United States* v. *Setaro,* (D. C. Conn.) 37 F. (2d) 134; *In re Oryell,* (D. C. N. Y.) 28 F. (2d) 639.

1. "The courts have not yet gone so far as to sustain the search of automobiles on mere suspicion that they are being used for the unlawful transportation of liquor. *If such right should be upheld, it would subject our citizens to a reign of terror.* It is important that the rule itself should be steadfast and strictly adhered to for the protection of the great rank and file of the law-abiding citizens of the country." (Italics ours.) *United States* v. *O'Connell, supra.*

(2)

In the interest of brevity we shall not repeat the facts; they are fully set out in the application for writ of certiorari, *supra*.[2] We respectfully refer the court to the summary of the facts in the dissenting opinion. (See footnote 4.)

If the majority opinion is permitted to stand, we respectfully submit, that the law is thrown into a state of utter confusion. It is impossible to reconcile the opinion of the Circuit Court of Appeals with the prior decisions of this court and the various Circuit Courts of Appeals. It is a startling and a dangerous departure from precedent, which, for all practical purposes, abrogates and nullifies the protection of the Fourth and Fifth Amendments as to all citizens driving upon the public highways.

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2. The majority opinion baldly misstates the record: "In response to further questioning, Brinegar stated there were about 12 cases of whiskey in the coupe. *Brinegar further stated that he had both a wholesale and a retail liquor dealer's stamp and asked if that would help him.* The officers *then* searched the car. * * *"

It is respectfully submitted that under our theory of the law the nature of the admission is immaterial, as *no* admission can retroactively supply the failure of probable cause and *no* admission obtained in the course of an illegal search in violation of the Fourth Amendment is admissible in evidence. However, we respectfully submit that the record *does not* sustain this finding. Brinegar was arrested and the search made on March 8, 1947. The statement by Brinegar relative to possession of liquor dealer's stamps was made admittedly after the search, after he had been placed under arrest, after he was taken to Miami, Oklahoma, and there incarcerated; the statement was made on the following day, March 4, 1947, while he was being taken from Miami, Oklahoma, to Tulsa, "On the way down from Miami he told me that he had a wholesale and retail liquor dealer's stamp." (R. 27, 21) We further believe the record to be replete that "their search began when they commenced the pursuit." Such was the position of the Government, both in the trial court and before the Circuit Court of Appeals. (R. 9, 11, 20, 23, 24, 25, 26, 31, 32; and statement by Government's Attorney, R. pp. 12 and 18: "That they would have searched his car in any event is borne out by the position the Government takes in this appeal, that the condition of the car at the time they first observed it, plus the fact that Brinegar had the reputation with the Alcohol Tax Unit agents of dealing in liquor, constituted probable cause warranting a search without a warrant." per Huxman, J.) Such an erroneous statement of fact by the majority, it is submitted, necessarily precludes the application of the law decisive of the issue here involved. *In re Fried*, (C. C. A. 2) 161 F (2d) 453, 462. Although this misstatement of fact was called to the court's attention on petition for rehearing the court refused even to correct it.

We submit that the holding and decision is in direct conflict with the rule laid down by this court in the leading case of *Carroll* v. *United States*, 267 U. S. 28, 45 S. Ct. 280, 29 L. ed. 543, 39 A. L. R. 790.

Under the Circuit Court of Appeals opinion Federal Agents may now pursue and forcibly stop, for the purpose of search, whomsoever they may please, *indiscriminately, at random and without probable cause,* and if through ignorance, chance, skillful interrogation or through the force and compulsion inherent in the attending circumstances the officers are able to obtain sufficient incriminating admissions they then have legitimatized their illegal enterprise, admittedly undertaken in affront to the law, and have clothed it with the sanctity of "probable cause"—thereby not only validating the search but making admissible in evidence against the defendant, both the statements and the evidence so obtained.

This court, on the contrary, has *consistently* held that a search and seizure without warrant must be made upon probable cause existing at the inception of the search or it is unreasonable within the meaning of the Fourth Amendment to the Constitution. The cases do not admit of any "retroactive effect" of after-acquired knowledge or information which may be added to admittedly insufficient knowledge so as to supply probable cause, which was necessary to the original pursuit and forcible stoppage. To affirm such a rule is to make meaningless the rule of "probable cause." If the constitutional guarantee is to have any meaning it must be held that in establishing "probable cause" *the officer is necessarily limited to the knowledge with which he initiates the search and that it may not be established upon the basis of subsequently discovered infor-*

mation by way of admission, or the discovery of contraband itself.[3]

In the *Carroll* case, Chief Justice TAFT, speaking for this court, lays down the test:

> "* * * we come now to consider under what circumstances such search may be made. It would be intolerable and unreasonable if a prohibition agent were authorized to stop every automobile on the chance of finding liquor, and thus subject all persons lawfully using the highways to the inconvenience and indignity of such a search * * * those lawfully within the country, entitled to use the public highways, have a right to free passage without interruption or search *unless there is known to a competent official authorized to search, probable cause for believing* that their vehicles are carrying contraband or illegal merchandise.
>
> . . . . . .
>
> "*The measure of legality* of such a seizure is, therefore, that the seizing officer *shall have reasonable or probable cause for believing that the automobile which he stops and seizes had contraband liquor therein which is being illegally transported.*" (Italics ours.)

(4)

The factual situation here involved is obvious! Notwithstanding the opinion of the Circuit Court of Appeals to the contrary, we respectfully submit that when the officers started out to "stop" Brinegar they had but one purpose and one intent in mind: to search that car! The search began when they commenced pursuit and the force, compulsion and coercion attending the surrounding circumstances was continuing throughout. We adopt the sum-

3. *Carroll* v. *United States*, 267 U. S. 132, 45 S. Ct. 280, 69 L. ed. 543, 39 A.L.R. 790; *Nueslein* v. *District of Columbia*, 115 F. (2d) 690, and cases cited under Argument (1), *supra*.

mary of HUXMAN, J.[4] The opinion of this court in *Amos* v. *United States*, 255 U. S. 313, 41 S. Ct. 266, 65 L. ed. 654, and the opinion of the Fifth Circuit Court of Appeals in *Ray* v. *United States*, 84 F. (2d) 654, are here applicable.[5]

(5)

Additionally, this amazing opinion holds that: *The search* was not commenced until after the pursuit was had, the defendant's car was run into the ditch and forcibly stopped, the interrogatories were propounded, the admissions obtained, and *then* or at some time thereafter the search was commenced.[6] That notwithstanding the absence of probable cause for search at the inception of the chase, the subsequent "voluntary admission" of Brinegar, made after being unlawfully stopped and interrogated, related back and was added to the insufficient information pre-

4. "By the admission of the agents-themselves, they did not pursue this car for the purpose of arresting Brinegar. Their testimony makes that very clear. They had no warrant for his arrest. They did not see him commit an act of law violation which would have warranted them in arresting him without a warrant. * * * What for then did they pursue him down the road with their siren screeching and crowd him off the highway, place him under restraint, and make it impossible for him to proceed. There can only be one answer—to ascertain whether he had whisky. *Ascertaining this constituted a search.* Is there anyone so naive as to believe that if he had answered that he had no whisky that they would have apologized, begged his pardon for having violated his constitutional rights as well as their oath of office to respect the Constitution, and permitted him to proceed? That they would have searched his car in any event is borne out by the position the Government takes in this appeal, that the condition of the car at the time they first observed it, plus the fact that Brinegar had the reputation with the Alcohol Tax Unit agents of dealing in liquor, constituted probable cause warranting a search without a warrant. In other words, they intended to search this car, and *the search was on when the chase began* and Brinegar was crowded off the road and prevented from going his lawful way as far as the Alcohol Tax Unit agents were concerned."

5. See also: *United States* v. *Baldocci*, (D. C., S. D. Cal.) 42 F. (2d) 567; *Duncan* v. *Commonwealth*, 198 Ky. 841, 250 S. W. 101; *State* v. *Lindway*, 131 Ohio St. 166, 2 N. E. (2d) 490; *United States* v. *Hoffenberg*, (D. C. N. Y.) 24 F. Supp. 989. Cf. *Hoppes* v. *State*, (Okla. Cr.) 105 P. (2d) 433; *Evans* v. *State*, (Okla. Cr.) 110 P. (2d) 621, and *Henderson* v. *United States*, (C. C. A. 4) 12 F. (2d) 548.

6. See Footnote 2, *supra*.

viously had by the Federal Investigators, so as to supply probable cause for the search and seizure. Having thus allowed the Investigators by their illegal action to "pull themselves up by their own bootstraps," the search is by the court legitimatized. It further holds that the admission and evidence secured by such search (clearly without probable cause at its inception) is admissible in evidence against a defendant.

We respectfully submit, it is impossible to reconcile this opinion with the decision of the Circuit Court of Appeals for the District of Columbia in *Nueslein* v. *District of Columbia*, 115 F. (2d) 690, the decision in *United States* v. *Hanley*, 50 F. (2d) 465. (See also the decision of the Fifth Circuit Court of Appeals in *Moring* v. *United States*, 40 F. (2d) 267).

"The facts in this case are indistinguishable in principle from those in these cases."[7] We shall not burden this brief with a review of the facts in the *Nueslein* and *Hanley* cases. In both cases the court held that the search involved commenced when the officers began their pursuit! There is no real question in this record that here the officers *were* illegally investigating when they gave chase, pursued the car with siren screaming forced it over to the side of the road, compelled it to stop, interrogated the driver and simultaneously therewith ordered him to get out of his car. Under the authority of the *Nueslein* and *Hanley* cases *these acts constituted a search.*

The *Nueslein* opinion, it is respectfully submitted, flatly holds that the evidence thus obtained through a *voluntary* declaration of fact is inadmissible in evidence as against

7. Huxman, J., dissenting. See also *United States* v. *Setaro*, (D. C., Conn.) 37 F. (2d) 134. Cf. *Henderson* v. *United States*, 12 F. (2d) 528.

defendant in a criminal prosecution.[8] It would be a work of supererogation and extreme vanity to here attempt to cover the authorities, the historical background, the determinations of policy and the scope of the Fourth and Fifth Amendments in more excellent, or scholarly fashion than has already been done by Mr. Justice VINSON in that opinion. In our opinion Justice VINSON in the *Nueslein* case had declared basic and fundamental constitutional policy. That policy underwrites and makes *vital* the basic philosophy of American Democracy. It not only merits the greatest weight and consideration by this court—its persuasiveness and basic right demand that it be pronounced by this court as fundamental policy.

(6)

We believe that it is fitting that the writ be here granted because this case presents to the court an issue of general and national importance. It deals with the most

8. As the *sole* authority for its conclusion to the contrary the opinion of the Circuit Court of Appeals cites it own decision in *Morgan* v. *United States*, 159 F. (2d) 85. By *a fortiori* reasoning, of course, if this decision is wrongly decided and the *Morgan* case is to the same effect, then the *Morgan* case is also erroneously determined. However, we respectfully point out to this court that the *Morgan* case is no authority. The point here involved was neither presented to nor determined by the court in that case. The opinion on its face discloses that the judgment of the lower court was there reversed *solely* on the ground that the motion for directed verdict as to Count 2 should have been sustained. The jury had acquitted appellant of the charge under Count 1. Under well established rules of construction, that part of the opinion relating to "arrest," not being determinative nor necessary to the actual holding or decision *is dicta*. Additionally we call the court's attention to the fact that the opinion in the *Morgan* case was written for the court by Judge Huxman. Certainly he is in position to state the matter then before the court and which was by the *Morgan* opinion determined. In his well reasoned dissent in this case Judge Huxman says:

> "The facts in the *Morgan* case are not nearly as strong on the question of pursuit as they are in this case. But in any event, *this precise point was not raised or decided in that case.* * * * The *Morgan* case is not authority for the proposition that a voluntary admission, obtained while officers were engaged in a search in violation of the Fourth Amendment, is admissible." (Emphasis ours.)

fundamental constitutional rights, privileges and immunities, the preservation of which it has repeatedly been held, is the highest function of the judiciary. Its importance and its implications reach far beyond the confines of this case. It is the resolve of a basic conflict: Shall we exact "a pound of flesh" even at the expense of the violation of a constitutional freedom or shall the policy of our Government be that we shall retain inviolate and living the constitutional guarantees of the American citizen at the expense of allowing a misdemeanant to escape punishment.

That is the basic issue which Mr. Justice Vinson resolves in the *Nueslein* case:

> "We feel that the policy of making effective in concrete cases, 'The right of the people * * against unreasonable searches and seizures, * * *' to be the more important."

It is that which Judge Huxman so ably states in his dissenting opinion in this case:

> "Of course, officers should not be unduly restricted in their efforts to enforce the law, but in no instance are they warranted in violating constitutional immunities in their effort to enforce the law. Having taken an oath to uphold the law, they should respect the rights of citizens guaranteed thereunder and should not, in their zeal, violate such rights. There is no conduct more unwarranted or offensive than to have an officer, who has taken an oath to uphold the law, pursue a citizen down the road, force him to the ditch, and interrogate him, all without probable cause, in the hope that he may obtain an admission ordinarily admissible under the Fifth Amendment, while engaged in violation of the Fourth Amendment."

The type of conduct approved by the opinion of the Circuit Court of Appeals, if followed, gives rise to the estab-

lishment of an American gestapo. It is a reincarnation and legalization of those practices which originally gave rise to the demand for these constitutional safeguards. The soil of Europe today cries out with the blood of free men sacrificed upon an altar erected out of the degradation of the basic rights we here seek to maintain.

Movements subversive to constitutional government do not suddenly appear—they are usually rooted to the slow, but steady and deadly denial of the rights of individuals. The upheaval of civil disorder is adumbrated years before by separate but continual violations of constitutional "guards."

We respectfully suggest that Americans have a feeling of abhorrence and repulsion regarding tactics of law enforcement which the opinion below approves and encourages. It is contrary to fundamental concepts of decent "fair play" and justice. *In re Fried,* (C. C. A. 2) 161 F. (2d) 453. We do not admit of the necessity of permitting an officer of the law to violate a constitutional safeguard in order to enforce a statute.[9] Nor do we believe that illegal acts of an officer should be "purged" of that illegality by the sacrifice of the constitutional rights of the citizen. The occasional detection of a misdemeanor certainly affords little justifica-

9. If petitioner was guilty he was guilty of a misdemeanor. He was not a felon. Petitioner had never before been convicted of any crime. He was transporting U. S. tax-paid liquor allegedly from Missouri into Oklahoma. He was lawfully upon the public highway. By the admission of the officers they did not see defendant commit any act of law violation which would have warranted them in arresting him without a warrant. Under the holding of the lower court itself they saw no violation of law and had no knowledge sufficient to constitute probable cause for their original pursuit. This certainly was not an "important" crime. There was no great public policy involved either in the transgression or in the enforcement. "Men of distinction" in some 45 of our American States were at the same time lawfully transporting tax-paid whisky. The law which was violated is not of real import—*it is no longer law today!* (The Liquor Enforcement Act of 1936 (Title 27, U. S. C., Sec. 223), under which this prosecution was had became inoperative as to Oklahoma by repeal of the Oklahoma "Permit Law" (37 O. S. A., Secs. 41-48, incl.) through enactment of Enrolled House Bill No. 254, effective April 24, 1947. There is present-

tion for lawlessness on the part of Federal officers sworn to uphold the Constitution.

We feel that the illegality basic to the original pursuit is "rottenness" which has penetrated to the very core. It is our feeling, and we respectfully submit, the feeling of this court, that all such methods of crime detection are unwholesome, un-American, and unnecessary "dirty business" which tend slowly, but surely, to the steady denial of the constitutional rights of the individual.[10]

We respectfully join with Judge HUXMAN in subscribing to the philosophy of the *Nueslein* case[11] and urge upon this court to declare it as the Federal rule! Its adoption *demands* the reversal of the opinion of the Circuit Court of Appeals.

We respectfully submit that this court should issue the writ prayed for.

Respectfully submitted,

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IRVINE E. UNGERMAN,
Counsel for Petitioner.

CHARLES A. WHITEBOOK,
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Of Counsel.

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ly no Federal law prohibiting the transportation of tax-paid whisky into the State of Oklahoma. *Von Patzoll* v. *United States*, (C. C. A. 10) 163 F. (2d) 216, certiorari denied.)). The same Government agency which seeks so strongly to convict by any means grants full authority, with its blessing, today to transport such liquor from Missouri to Oklahoma. The defendant here received a fine of $100.00 and a sentence of 30 days. The inflicting of this punishment upon petitioner will serve as no deterrent to others and will uphold no existing law.

10. See, Mr. Justice Holmes, dissenting in *Olmstead* v. *United States*, 277 U. S. 438, 470 (1927).

11. "I subscribe fully to the philosophy of the *Nueslein* case. The personal guarantees of the Constitution are sacred rights. They are the things for which men have died through the centuries. * * * Whenever a violation of one of these rights is involved, all reasonable presumptions should be resolved against one charged with a violation thereof and the burden should be placed upon him to bring his conduct clearly within the constitutional power."

12

No. 551

In the Supreme Court of the United States

October Term, 1947.

VIRGIL T. BRINEGAR, *Petitioner,*

vs.

UNITED STATES OF AMERICA, *Respondent.*

On Certiorari to the United States Circuit Court of Appeals for the Tenth Circuit.

BRIEF of PETITIONER.

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SUBJECT INDEX.

TABLE OF CASES.

Text Books and Statutes Cited.

IN THE SUPREME COURT OF THE UNITED STATES.

October Term, 1947.

No. 551

VIRGIL T. BRINEGAR, *Petitioner,*

vs.

UNITED STATES OF AMERICA, *Respondent.*

BRIEF *of* PETITIONER.

To the Honorable, The Supreme Court of the United States:

Your petitioner, Virgil T. Brinegar, respectfully shows:

I.

The Opinion of the Court Below.

The opinion of the Circuit Court of Appeals for the Tenth Circuit is now officially reported: *Brinegar* v. *United States,* 165 F. 2d 512; HUXMAN, J., dissenting. It appears in the Record. (R. 36-41) The dissenting opinion of HUXMAN, J., also appears in the record. (R. 41-47)

No formal opinion was written by the trial judge. The *per curiam* decision of SAVAGE, J., appears in the record: "Colloquy between court and counsel" (R. 12-14) and "Denial of motion to suppress." (R. 14) Judgment and sentence of the District Court is to be found at R. 4.

II.

Jurisdiction.

1. The writ of *certiorari* was applied for under Rule 38 of this court and jurisdiction was invoked under Sec. 240(a) of the Judicial Code, as amended, Title 28, U. S. C., Sec. 347(a) and is the proper remedy.

—*Ex parte Lau Ow Bew*, 141 U. S. 583.

2. The opinion of the Circuit Court of Appeals for the Tenth Circuit was filed on December 10, 1947. (R. 36) Upon order for extension of time duly had (R. 45) petition for rehearing was filed and denied January 2, 1948. (R. 47) The opinion of the Court was entered the same day.

3. Petition for writ of certiorari was timely filed in this Court on January 27, 1948, and writ was by the court granted on March 8, 1948. (R. 49) (... U. S. ..., 68 S. Ct. 662, 92 L. ed 577).

III.

Statement of the Case.

1.

PROCEEDINGS IN TRIAL COURT.

On March 5, 1947, an Information was filed in the United States District Court for the Northern District of Oklahoma (Criminal, No. 11,207) charging petitioner, Virgil T. Brinegar, with violation of the Liquor Enforcement Act of 1936, Title 27, U. S. C., Sec. 223, a misdemeanor. (R. 1-2) On May 5, 1947, petitioner duly filed his motion to suppress the evidence on the ground that it was obtained as a result of an unlawful arrest, and unlawful search and seizure, without a warrant, and in violation of the Fourth Amendment to the Constitution. (R. 2) Upon hearing duly

had the court overruled the motion to suppress on May 9, 1947. (R. 2-3, 14)

Thereupon, on arraignment, petitioner entered his plea of not guilty, and the cause was tried to a jury which returned a verdict of guilty as charged. (R. 3) On May 16, 1947, the court pronounced judgment and sentence of thirty days' imprisonment and to pay a fine of $100.00. (R. 4)

2.

THE FACTS.

The facts adduced in evidence were briefly the following:

On March 3, 1947, petitioner was driving his 1946 Ford Coupe westerly toward Quapaw, Oklahoma. It was about 6:00 o'clock p. m. and petitioner was returning to his home in Vinita, Oklahoma, from Joplin, Missouri. (R. 29, 30) At a point about five miles west of the Missouri line, about a quarter of a mile east of the Quapaw bridge, two Alcohol Tax Unit Investigators, Mr. Malsed and Mr. Creehan, were lying in wait in their car. (R. 8, 10-11, 16, 18) Their car was facing west, but Creehan "looked through the rear vision mirror and saw a car rounding the curve about a mile east" of their position. (R. 10) There was nothing untoward in the presence of a car on the highway, nor in the approach of petitioner's car. "As this car passed" both Malsed and Creehan noted that the car appeared to be "heavily loaded"; but there was no testimony whatsoever that the springs were sagging, or that the back end was down, or similar circumstances (R. 8, 9, 10, 11, 12) and both the trial court and the Circuit Court of Appeals held that the appearance of the car did not constitute probable cause. (R. 9, 12, 38-39) Malsed, who had previously arrested Brinegar on September 30, 1946, recognized peti-

tioner when he passed, informed Creehan, "That is Brinegar," and on the sounding of that "charge" the officers immediately gave chase. (R. 8, 10, 17, 21) Petitioner then increased his speed and after a movie-thriller run of about a mile, over rough, sharp curving, slick and dangerous roads at a speed of sixty miles per hour, the officers opened their siren, crowded petitioner off of the road, into a ditch *and forced him to stop!* (R. 8, 10, 11, 17, 18, 19, 21, 22, 29, 32)

Petitioner first realized that the Federal agents were trying to stop him when "the siren blowed," and upon such realization he stopped as quickly as he could. (R. 31-32) He was forced to stop under the most extreme compulsion: driving, so the Federal agents testified, at a speed of up to sixty miles per hour, they drove along side of petitioner's car, "forced him off of the road," into the ditch and prevented his forward progress by bringing their car to a stop at the side of and to the front of petitioner's car, thereby forming a barricade. (R. 8, 10, 18, 21, 22, 29, 32)

Malsed got out of the right side of the investigator's car, and Creehan jumped from the left side and they both started back to petitioner's car. (R. 8, 17, 19, 23, 24) Malsed said, "Hello Brinegar, how much liquor have you got in the car?" (R. 8, 9, 17, 19) To which Brinegar replied, "Not too much." (R. 7, 8, 9, 17, 19) Simultaneously therewith and while both officers were still approaching petitioner's car, Creehan, who testified that they "make it a point" to get the driver out of his car, so that he can't get away with it, ordered or "requested" Brinegar to get out of his car. (R. 23-24) Brinegar complied. (R. 19, 29)

With the door of the car thus opened the officers testified they were able to see a case of whisky in the front of the car (R. 8-9, 19, 22) and subsequent search revealed some

twelve or thirteen cases of whisky contained and concealed in a compartment under and back of the seat. (R. 9, 19, 23) The record is clear that prior to the stopping of the car the officers could not see any whisky, and had no personal knowledge that Brinegar was in fact transporting any whisky. (R. 22) According to the officers, petitioner was placed "under arrest" after they searched the car and discovered the whisky. That was fully fifteen minutes or more after they had originally stopped the car. According to Officer Malsed the "formal arrest" was then made by advising petitioner that, "We are taking you in." (R. 9, 20, 21) Creehan was of the opinion that no formal arrest was ever made; petitioner being merely advised, "Well, you get in the car, come along with us." (R. 22) Brinegar, the car and the whisky were all taken into custody on the spot. (R. 20, 22)

The Federal Investigators admittedly had no warrant for the arrest of petitioner, had no search warrant for the search and seizure, and, of course, served no warrant upon petitioner. (R. 7, 10, 11)

3.

APPEAL.

On appeal the United States Circuit Court of Appeals for the Tenth Circuit, (PHILLIPS, HUXMAN, and MURRAH, Circuit Judges, sitting) affirmed the judgment and sentence of the trial court in a 2 to 1 decision. The court in an opinion by PHILLIPS, J., held (R. 36-41):

> First. That the facts within the knowledge of the investigators prior to the time the incriminating statements were made, were not sufficient as basis for and *did not constitute probable cause for a search.*
>
> Second. That said facts were insufficient to pro-

vide the basis for and *did not constitute probable cause for the arrest of petitioner without a warrant.*

Third. That under the facts in evidence whether Brinegar was arrested "may be doubted," but that it was *unnecessary to decide* this question.

Fourth. That under the circumstances disclosed by the record the statements made by petitioner were not coerced by the action of the officers, but were voluntarily made.

Fifth. That the search was commenced and made *after* the pursuit, the interrogation and the admissions obtained.

Sixth. That notwithstanding the absence of probable cause for search or arrest at the inception of pursuit, the subsequent voluntary admission of petitioner, made after being unlawfully stopped upon suspicion only and interrogated with respect to whisky, *could relate back and be added to the insufficient information previously had* by the investigators so as to constitute probable cause for the search and seizure.

Seventh. That the statements and evidence obtained while officers were engaged in conducting a search without probable cause are admissible in evidence on the trial of the defendant.

The error of the court was excised by the well-reasoned dissenting opinion of HUXMAN, J., who lays it down (R. 41-44):

First. That the search began and was continuing from the commencement of the pursuit of petitioner by the Federal officers. That the pursuit was undertaken upon suspicion only and solely for the purpose of searching petitioner's car for the discovery of evidence of violation of law.

Second. That under the facts in evidence there was *clearly no probable cause* warranting the search,

the seizure or the arrest of petitioner without a warrant.

Third. That the acts of the officers in pursuing the car, forcing it to the ditch, compelling it to stop, making further progress impossible and interrogating the driver *constituted a search.*

Fourth. That the admission upon which the Government relies was obtained while the Federal agents were engaged in an illegal search of petitioner's car in violation of the Fourth Amendment.

Fifth. That an admission against interest or other evidence obtained while Federal agents are engaged in conducting an illegal search in violation of the Fourth Amendment is inadmissible in evidence.

IV.

Specification of Errors.

First. The Circuit Court of Appeals erred in holding that a search and seizure, without a search warrant, commenced by Federal agents without probable cause, can be validated so as to make admissible the evidence thereby obtained, where subsequent to the unlawful pursuit and forcible stopping or arrest, but during such illegal search the officers obtain an incriminating admission from the defendant through chance, interrogation or the force and compulsion inherent in the attending circumstances.

Second. The Circuit Court of Appeals erred in holding that the acts of the A. T. U. agents—in pursuing an automobile lawfully on the highway, in compelling the driver to stop his car by forcing him off the road, in placing him under restraint or arrest and making his further forward progress impossible, and in interrogating the driver, all without probable cause or the commission of any offense in the agents' presence, for the purpose of ascertaining the existence of a violation of law—did not constitute a search.

Third. The Circuit Court of Appeals erred in holding the determination of the existence or validity of an arrest without a warrant for violation of the Liquor Enforcement Act of 1936, (27 U. S. C. 223) within the State of Oklahoma is a matter of general Federal law in the absence of an applicable Federal statute.

Fourth. The Circuit Court of Appeals erred in holding that a "voluntary" statement obtained while Federal agents are engaged in conducting a search, without a warrant, and without probable cause, in violation of the Fourth Amendment to the Constitution of the United States is admissible in evidence against the defendant in a subsequent criminal case arising from such illegal search.

Fifth. The Circuit Court of Appeals erred in permitting the Federal Alcohol Tax Unit Agents, arbitrarily, without warrant, without justification and without probable cause, to pursue and forcibly stop, at random, any citizen upon the public highways, and to subject the citizen to such inconvenience and indignity, upon the chance of discovering in his vehicle, liquor, to be used as evidence against him, and to furnish the basis for a criminal prosecution.

V.

Points and Authorities.

1.

The acts of the Alcohol Tax Unit Agents in pursuing petitioner's car, in compelling him to stop by forcing his car off the highway, in placing petitioner under restraint or arrest, making his further progress impossible, and in interrogating him, all without probable cause or the commission of any offense in the presence of the officers, for

the purpose of ascertaining the existence of a violation of law, constituted a search.

—*Nueslein* v. *District of Columbia,* (C. C. A. D. C.) 115 F. 2d 690;
United States v. *Hanley,* (D. C. N. Y.) 50 F. 2d 465;
Johnson v. *United States,* (No. 329, October Term, 1947, decided February 2, 1948) 333 U. S. 10, 68 S. Ct. 367, 92 L. ed. 323;
Edwards v. *State,* (Okl. Cr.) 177 P. 2d 143;
Black v. *State,* 63 Okl. Cr. 317, 74 P. 2d 1172;
Hoppes v. *State,* 70 Okl. Cr. 179, 105 P. 2d 433;
Evans v. *State,* 71 Okl. Cr. 239, 110 P. 2d 621.

2.

The determination of the existence or validity of an arrest without a warrant for violation of the Liquor Enforcement Act of 1936 (27 U. S. C. 223) within the State of Oklahoma is controlled by the law of the State of Oklahoma.

—*United States* v. *Di Re,* (No. 61, October Term, 1947, decided January 5, 1948) 332 U. S. 581, 68 S. Ct. 222, 92 L. ed. 218;
Johnson v. *United States,* (No. 329, October Term, 1947, decided February 2, 1948) 333 U. S. 10, 68 S. Ct. 367, 92 L. ed. 323.

3.

Under the law of Oklahoma a citizen's car may not be stopped on mere suspicion and his car searched in order to procure evidence against him. A search or arrest without a warrant can be valid only if for an offense committed in the presence of the arresting officer or for a felony of which the officer had reasonable cause to believe defendant guilty.

—*Hoppes* v. *State,* 70 Okl. Cr. 179, 105 P. 2d 433;
Ingraham v. *State,* 48 Okl. Cr. 178, 290 P. 344;
Graham v. *State,* (Okl. Cr.) 184 P. 2d 984;

Childress v. *State*, 31 Okl. Cr. 208, 238 P. 218;
Leary v. *State*, (Okl. Cr.) 67 P. 2d 972;
Edwards v. *State*, (Okl. Cr.) 177 P. 2d 143;
Keith v. *State*, 30 Okl. Cr. 168, 235 P. 631;
Evans v. *State*, 71 Okl. Cr. 239, 110 P. 2d 621;
Ketcham v. *State*, 63 Okl. Cr. 428, 75 P. 2d 1159;
Tucker v. *State*, 62 Okl. Cr. 406, 71 P. 2d 1092;
Bowdry v. *State*, 64 Okl. Cr. 86, 77 P. 2d 753;
Black v. *State*, 63 Okl. Cr. 317, 74 P. 2d 1172.

The fact that defendant was conveying liquor, not being discoverable without a search, the offense of conveying was not committed in the presence of the officers.

—*Sowards* v. *State*, 27 Okl. Cr. 431, 259 P. 157;
Leary v. *State*, (Okl. Cr.) 67 P. 2d 972;
and cases cited *supra*.

4.

Under the Oklahoma law where officers pursue an automobile on the highway and sound their siren as a result of which the driver stops his car and submits to the restraint of the officers, an arrest is then and there consummated.

Under the Oklahoma law where officers pursue an automobile lawfully on the highway, compel the driver to stop his car by forcing him off the road, place him in restraint and prevent the further forward progress of his car an arrest is then and there consummated.

Under the Oklahoma law where such an arrest without warrant is made without probable cause or the commission of an offense in the officer's presence the arrest is unlawful and a search incident thereto is unreasonable and illegal.

Under the Oklahoma law where the officer becomes aware of the facts constituting the offense *after* making

an unlawful arrest, the arrest cannot be justified as being for an offense committed in his presence.

Under the Oklahoma law if the arrest by the officer is unlawful voluntary statements or admissions, if any, made by the defendant following such unlawful arrest, are incompetent and inadmissible on a motion to suppress the evidence

Under the Oklahoma law the search commences with the pursuit and the illegal search and pursuit cannot be legalized by any subsequent admission, waiver, commission of offense or the discovery of the contraband.

—*Hoppes* v. *State*, 70 Okl. Cr. 179, 105 P. 2d 433;
Evans v. *State*, 71 Okl. Cr. 239, 110 P. 2d 621;
Edwards v. *State*, (Okl. Cr.) 177 P. 2d 143;
Bohannon v. *State*, 66 Okl. Cr. 190, 90 P. 2d 675;
Hammer v. *State*, 44 Okl. Cr. 249, 280 P. 475;
Ingraham v. *State*, 48 Okl. Cr. 178, 290 P. 344;
22 Okl. St. Ann., Sec. 186;
22 Okl. St. Ann., Sec. 190;
22 Okl. St. Ann., Sec. 196.

5.

Under the Fourth Amendment it is imperative that a search and seizure without warrant be made upon "probable cause" then existing or it is unreasonable and unlawfully made.

—*Carroll* v. *United States*, 267 U. S. 132, 45 S. Ct. 280, 69 L. ed. 543, 39 A. L. R. 790;
Pearson v. *United States*, (C. C. A. 10) 150 F. 2d 219;
Johnson v. *United States*, (No. 329, October Term, 1947, decided February 2, 1948) 333 U. S. 10, 68 S. Ct. 367, 2 L. ed. 323;
United States v. *One 1937 Model Studebaker Sedan*, (C. C. A. 10) 96 F. 2d 104.

6.

In establishing "probable cause"—that is, the circumstances necessary to lead a reasonably discreet and prudent man to believe that liquor is illegally being transported in the automobile attempted to be searched—the officer is limited to the facts and circumstances within his knowledge with which he initiates the search. Probable cause cannot be supplied upon the basis of the discovery of contraband or any subsequent admissions. "In law it is good or bad when it starts and does not change character from its success."

—*Amos* v. *United States*, 255 U. S. 313, 41 S. Ct. 266, 65 L. ed. 654;
Byars v. *United States*, 273 U. S. 28, 47 S. Ct. 248, 71 L. ed. 520;
Carroll v. *United States*, 267 U. S. 132, 45 S. Ct. 280, 69 L. ed. 543, 39 A. L. R. 790;
Wisniewski v. *United States*, (C. C. A. 6) 47 F. 2d 825;
Pearson v. *United States*, (C. C. A. 10) 150 F. 2d 219;
United States v. *O'Connell*, (D. C.) 43 F. 2d 1005;
Henderson v. *United States*, (C. C. A. 4) 12 F. 2d 528;
Nueslein v. *District of Columbia*, (C. C. A. D. C.) 115 F. 2d 690;
United States v. *Di Re*, *supra*;
Johnson v. *United States*, *supra*.

7.

Agents of the Alcohol Tax Unit have no right or authority without warrant, without probable cause, and upon mere suspicion that the automobile is being used for the unlawful transportation of liquor, to pursue and forcibly stop, at random, citizens upon the public highways and to subject the citizen to such inconvenience and indignity upon the chance or for the purpose of discovering in the ve-

hicle liquor to be used as evidence against the citizen or to furnish the basis for a criminal prosecution.

—*Carroll* v. *United States*, 267 U. S. 132; 45 S. Ct. 280, 69 L. ed. 543, 39 A. L. R. 790;
Wisneiwski v. *United States*, *supra*;
Pearson v. *United States*, *supra*;
United States v. *O'Connell*, *supra*;
Moring v. *United States*, (C. C. A. 5) 40 F. 2d 267;
Cf. *Carr* v. *United States*, (C. C. A. 2) 59 F. (2d) 991;
United States v. *Hanley*, (C. C. A. 5) 50 F. 2d 465.

8.

The statement of Brinegar relative to his possession of whisky: "Not too much," following the initiation of the unlawful search and after he had been unlawfully arrested and was in the custody of the Federal officers, was not "voluntarily made." There was only a nominal, not a true volition. It was compelled by the circumstances in which he found himself. It is "tinged with official coercion."

—*Amos* v. *United States*, 255 U. S. 313, 41 S. Ct. 266, 65 L. ed. 654;
United States v. *Baldocci*, (D. C. S. D. Cal.) 42 F. 2d 567;
Ray v. *United States*, (C. C. A. 5) 84 F. 2d 654;
Duncan v. *Commonwealth*, 198 Ky. 841, 250 S. W. 101;
United States v. *Hoffenberg*, (D. C. N. Y.) 24 F. Supp. 989;
Edwards v. *State*, (Okl. Cr.) 177 P. 2d 143;
The People v. *Lind*, 370 Ill. 131, 18 N. E. 2d 189;
Graham v. *State*, (Okl. Cr.) 184 P. 2d 984;
Hoppes v. *State*, (Okl. Cr.) 105 P. 2d 433;
Henderson v. *United States*, (C. C. A. 4) 12 F. 2d 528.

9.

Under the Federal rule, a voluntary admission or other evidence obtained while Federal agents are engaged in con-

ducting an illegal search in violation of the Fourth Amendment is inadmissible in evidence on trial of defendant or upon motion to suppress.

—*Nueslein* v. *District of Columbia*, (C. C. A. D. C.) 115 F. 2d 690;
United States v. *Hanley*, (D. C. N. Y.) 50 F. 2d 465;
United States v. *Setaro*, (D. C. Conn.) 37 F. 2d 134;
In re Oryell, (D. C. N. Y.) 28 F. 2d 639;
In re Fried, (C. C. A. 2) 161 F. 2d 453;
Moring v. *United States*, (C. C. A. 5) 40 F. 2d 267;
Worthington v. *United States*, (C. C. A. 6) 166 F. 2d 557;
Cf. *United States* v. *Di Re*, *supra* (as to duty of one illegally arrested to resist or peaceably submit to custody);
Boyd v. *United States*, 116 U. S. 616, 6 S. Ct. 524, 29 L. ed. 746;
Gouled v. *United States*, 255 U. S. 298, 41 S. Ct. 261, 65 L. ed. 647;
Amos v. *United States*, 255 U. S. 313, 41 S. Ct. 266, 65 L. ed. 654.

For Oklahoma rule to same effect under constitutional provisions identical to those of the Fourth and Fifth Amendments (Sections 21 and 30, Oklahoma Bill of Rights, Article II, Secs. 21 and 30, Constitution of Oklahoma) see:

Hoppes v. *State*, 70 Okl. Cr. 179, 105 P. 2d 433;
Evans v. *State*, 71 Okl. Cr. 239, 110 P. 2d 621;
Edwards v. *State*, (Okl. Cr.) 177 P. 2d 143;
and cases cited *supra* under Point 4.

ARGUMENT.

(1)

No Probable Cause Existed for Search or Arrest Without Warrant.

The undisputed testimony of the Federal Alcohol Tax Unit Agents firmly establishes: That the facts within the knowledge of the officers at the inception of their pursuit of petitioner, at the time of his forcible restraint and arrest, and prior to the time of the making of the alleged incriminating statements were insufficient as basis for and did not constitute probable cause either for a search and seizure without a warrant, or for the arrest of petitioner without a warrant. The record is certain that no offense had been committed in the presence of the officers and there is no suggestion that a felony had been committed of which the officers had reasonable cause to believe petitioner guilty. (R. 7-12) The learned Trial Judge expressly so found (R. 12)[1]; the majority opinion of the Circuit Court of Appeals so holds (R. 38); as does Judge HUXMAN in his dissent. (R. 41)

> "We are of the opinion that the facts within the knowledge of the investigators and of which they had reasonable trustworthy information prior to the time the incriminating statements were made by Brinegar *were not sufficient* to lead a reasonably discreet and prudent man to believe that intoxicating liquor was being transported in the coupe *and did not constitute*

1. "The witness has already stated there was no appearance in the rear that indicated that the car was heavily loaded. Usually the testimony is that the springs were sagging and so on, but we don't have that in this case."

* * * * * * * * *

"It is my judgment that the mere fact that the agents knew that this defendant was engaged in hauling whiskey, even coupled with the statement that the car appeared to be weighted, would not be probable cause for the search of this car." (R. 12)

Cf: Pearson v. United States, (C. C. A. 10) 150 F. 2d 219.

*probable cause for a search.** *Neither were such facts sufficient,* in our opinion, to induce an ordinarily prudent and cautious person, under the circumstance, to believe in good faith that Brinegar had committed a felony so as *to constitute probable cause for the investigators arresting Brinegar without a warrant.*** (R. 38-39, 165 F. 2d 512.) (Italics ours.)

In the interest of brevity we shall not repeat the evidence; it is fully set out *supra* under statement of the case. We respectfully adopt the summary of Judge HUXMAN in its entirety.[2] (Note 21, *infra;* R. 41-42.)

Admittedly the officers had no warrant for the arrest of Brinegar, had no search warrant for the search and seizure, and served no warrant upon him. (R. 7, 10)

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* "Von Patzoll v. United States, 10 Cir., 163 F. 2d 216, 220, and cases there cited."

** "Papani v. United States, 9 Cir., 84 F. 2d 160, 163;
Wisniewski v. United States, 6 Cir., 47 F. 2d 825;
Stacey v. Emery, 97 U. S. 642, 645;
United States v. One 1941 Oldsmobile Sedan, 10 Cir., 158 F. 2d 818, 819."

2. The majority opinion holds:

> "In response to further questioning, Brinegar stated that there were about 12 cases of whiskey in the coupe. *Brinegar further stated that he had both a wholesale and a retail liquor dealer's stamp and asked if that would help him.* The officers *then* searched the car. * * *" (R. 37)

It is respectfully submitted that under the authorities the nature of the admission is completely immaterial as *no* admission can *retroactively supply the failure of probable cause* and *no* admission obtained in the course of an illegal search in violation of the Fourth Amendment is admissible in evidence!

(2)

Constitutional Requirements for Search and Seizure.

In the decisions of this Court and of the various Circuit Courts of Appeals the constitutional requirements for search and seizure under the provisions of the Fourth Amendment had been so oft declared that certain propositions were by the Bar considered fundamental:[3]

> That it is imperative that a search and seizure without warrant be made upon "probable cause" *then existing* or it is unreasonable within the meaning of the Fourth Amendment and unlawfully made.[4]
>
> That in establishing "probable cause"—that is, the circumstances necessary to lead a reasonably discreet and prudent man to believe that liquor is illegally being transported in the automobile to be searched—the *officer is limited to the facts and circumstances within his knowledge with which he initiates the search.* Probable cause cannot be supplied upon the basis of the discovery made or upon subsequently obtained admissions. The discovery of contraband does not in any manner retroactively validate or justify the illegal search.[5]

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3. Generally as to origins, scope, and meaning of the Fourth and Fifth Amendments—"the very essence of constitutional liberty"—see: Amos v. United States, 255 U. S. 313, 41 S. Ct. 266, 65 L. ed. 654; Silverthorne Lumber Co. v. United States, 251 U. S. 385, 40 S. Ct. 182, 64 L. ed. 319; Weeks v. United States, 232 U. S. 383, 34 S. Ct. 341, 58 L. ed. 652; Adams v. New York, 192 U. S. 585, 24 S. Ct. 372, 48 L. ed. 575; Gouled v. United States, 255 U. S. 302, 41 S. Ct. 261, 65 L. ed. 650; Boyd v. United States, 116 U. S. 616, 6 S. Ct. 524, 29 L. ed. 746; Nueslein v. District of Columbia, (C. C. A. D. C.) 115 F. 2d 690.

4. Carroll v. United States, 267 U. S. 132, 45 S. Ct. 280, 69 L. ed. 543, 39 A. L. R. 790; Pearson v. United States, (C. C. A. 10) 150 F. 2d 219; United States v. One 1937 Model Studebaker Sedan, (C. C. A. 10) 96 F. 2d 104; Johnson v. United States, (No. 329, October Term, 1947) 333 U. S. 10, 68 S. Ct. 367, 92 L. ed. 323.

5. Amos v. United States, 255 U. S. 313, 41 S. Ct. 266, 65 L. ed. 654; Byars v. United States, 273 U. S. 28, 47 S. Ct. 248, 71 L. ed. 520; Carroll v. United States, *supra*, note 4; Wisniewski v. United States, (C. C. A.

That agents of the Alcohol Tax Unit *have no right or authority*, without warrant, without probable cause and upon mere suspicion that the automobile is being used for the unlawful transportation of liquor, *to pursue and forcibly stop citizens* upon the public highways and to subject the citizen to such indignity upon the chance of or for the purpose of discovering liquor to be used as evidence against the citizen in a subsequent prosecution.[6]

That under the Federal rule a voluntary admission or other evidence obtained while Federal agents are engaged in conducting an illegal search without a warrant and *without probable cause in violation of the Fourth Amendment is inadmissible* in evidence on trial of the defendant or upon motion to suppress.[7]

(3)

Basic Considerations of the Federal Rule of Inadmissibility.

The opinion of the Circuit Court of Appeals completely disregarded these fundamental precepts and precedents, we

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(Footnote 5, continued:)

6) 47 F. 2d 825; Pearson v. United States, *supra*, note 4; United States v. O'Connell, 43 F. 2d 1005; Nueslein v. District of Columbia, *supra*, note 3; United States v. Di Re, (No. 61, October Term, 1947) 332 U. S. 581, 68 S. Ct, 222, 92 L. ed. 218; Johnson v. United States, *supra*, note 4.

6. Carroll v. United States, *supra*, note 4; Wisniewski v. United States, *supra*, note 4; Pearson v. United States, *supra*, note 4; United States v. O'Connell, *supra*, note 4; Moring v. United States, (C. C. A. 5) 40 F. 2d 267; *Cf*: Carr v. United States, (C. C. A. 2) 59 F. 2d 991; United States v. Hanley, (C. C. A. 5) 50 F. 2d 465.

7. Nueslein v. District of Columbia, (C. C. A. D. C.) 115 F. 2d 690; United States v. Hanley, (D. C. N. Y.) 50 F. 2d 465; United States v. Setaro, (D. C. Conn.) 37 F. 2d 134; In re Oryell, (D. C. N. Y.) 28 F. 2d 639; In re Fried, (C. C. A. 2) 161 F. 2d 453; Moring v. United States, (C. C. A. 5) 40 F. 2d 267; Worthington v. United States, (C. C. A. 6) 166 F. 2d 557; Gouled v. United States, 255 U. S. 298, 41 S. Ct. 261, 65 L. ed. 647; Amos v. United States, 255 U. S. 313, 41 S. Ct. 266, 65 L. ed. 654; Boyd v. United States, 116 U. S. 616, 6 S. Ct. 524, 29 L. ed. 746.

submit, and failed to apply the Federal Rule because it failed to appreciate the basic considerations which led to its adoption: Shall the courts of the United States by admitting such evidence approve and encourage illegal action on the part of Federal agents and themselves become accomplices in the willful violation of the constitutional rights of the citizen? Is it more important that all criminals be apprehended and punished even at the expense of the violation of fundamental constitutional rights or is it more important that the courts maintain inviolate and effective the constitutional "guard" even at the expense of permitting some misdemeanants to escape punishment?

We respectfully suggest that the practice approved by the opinion of the Circuit Court of Appeals is the very conduct which originally gave rise to the demand for the constitutional "guard." We further submit that the American people have a feeling of abhorrence and repulsion regarding tactics of law enforcement which the opinion below approves and encourages. Such law enforcement is contrary to the American concept of decent "fair play" and justice. *In re Fried*, (C. C. A. 2) 161 F. 2d 453.

In the famous seditious libel prosecution[8] which in no small measure led to the adoption of the Fourth Amendment, Lord Camden laid it down that "search for evidence" is repugnant to the law. This Court has repeatedly held that the Fourth Amendment embodies this principle.[9]

Two great liberals of this Court, Mr. Justice HOLMES and Mr. Justice BRANDEIS, a score of years ago declared it

8. Entick v. Carrington, 18 How. St. Tr. 1029, 1073, 95 Eng. Rep. 807, —818 (K. B. 1765).

9. Boyd v. United States, 116 U. S. 616, 6 S. Ct. 524, 29 L. ed. 746; Gouled v. United States, 255 U. S. 302, 41 S. Ct. 261, 65 L. ed. 650, and cases cited *supra*, note 3.

to be "dirty business" for the Government or its officers to make use of evidence obtained in violation of law; and pointed out that thereby the guaranty of the Fourth Amendment ceases to have meaning or provide protection.

Mr. Chief Justice VINSON in his exhaustive and scholarly opinion in the *Nueslein* case more recently resolved the question in the same manner. His opinion leaves little further to be said. It is incredible that the court below appreciating the tenor of the Constitution and its construction by this Court could have understood the full import of his opinion and rejected its philosophy and holding.[10]

It is the resolve of that principle which Judge HUXMAN voices in his dissenting opinion:

> "I subscribe fully to the philosophy of the *Nueslein* case * * *. Of course, officers should not be unduly restricted in their efforts to enforce the law, *but in no instance are they warranted in violating constitutional immunities in their effort to enforce the law.* Having taken an oath to uphold the law, they should respect the rights of citizens guaranteed thereunder and should not, in their zeal, violate such rights. *There is no conduct more unwarranted or offensive than to have an officer, who has taken an oath to uphold the law, pursue a citizen down the road, force him to the ditch, and interrogate him, all without probable cause, in the hope that he may obtain an admission ordinarily admissible under the Fifth Amendment, while engaged in violation of the Fourth Amendment.*" (R. 44) (Italics ours.)

And this Court but yesterday reaffirmed that it does not admit of the desirability or the necessity of permitting officers of the law to violate the basic law—the Constitu-

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10. Mr. Justice HOLMES, dissenting in Olmstead v. United States, 277 U. S. 438, 471, 485; Mr. Justice BRANDEIS dissenting in the *Olmstead* case, *supra*; Nueslein v. District of Columbia, 115 F. 2d. 690.

tion—in order to enforce a statute.[11] Said Mr. Justice JACKSON speaking for this Court:

> "But the forefathers, after consulting the lessons of history, designed our Constitution to place obstacles in the way of a too permeating police surveillance, which they seemed to think was a greater danger to a free people than the escape of some criminals from punishment."

(4)

Circuit Court Opinion Is in Direct Conflict With the *Carroll* Case.

We respectfully submit that the holding and decision of the Circuit Court below is in direct conflict with the rule laid down by this Court in *Carroll* v. *United States*.[12]

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11. United States v. Di Re, *supra*, note 5; Johnson v. United States, *supra*, note 4.

The offense here involved is a misdemeanor. Liquor Enforcement Act of 1936, Title 27, U. S. C., Sec. 223. Petitioner was not a felon. He had never before been convicted of any crime. He was allegedly transporting U. S. tax-paid liquor from Missouri into Oklahoma. He was lawfully upon the public highway. By the admission of the officers they did not see defendant commit any violation of law which would have warranted them in arresting him without a warrant. They had no probable cause for their original pursuit. This certainly is not an "important" crime. There was no great public policy involved either in the transgression or in the enforcement. The law which was violated is not of real import—*it is no longer law today!* The Liquor Enforcement Act of 1936 under which this prosecution was had became inoperative as to Oklahoma by repeal of the Oklahoma "Permit Law" (37 Okla. Stats. Ann., Secs. 41-48, incl.) through enactment of Enrolled House Bill No. 254, effective April 24, 1947. There is presently no Federal law prohibiting the transportation of tax-paid whisky into the State of Oklahoma. Von Patzoll v. United States, (C. C. A. 10) 163 F. 2d 216, *certiorari* denied. The same governmental agency which seeks here so strongly to convict by means which we believe in violation of constitutional rights today suffers unlimited transportation of the same nature. The defendant here received a fine of $100.00 and a sentence of 30 days. Inflicting this punishment upon petitioner will serve as no deterrent to others and will uphold no existing law.

12. 267 U. S. 28, 45 S. Ct. 280, 29 L. ed. 543, 39 A. L. R. 790:

In the *Di Re* case this Court called attention to the limitations

Under the Circuit Court of Appeals opinion Federal agents may now pursue and forcibly stop, for the purpose of search and the discovery of evidence of violation of law, whomsoever they may please, *indiscriminately, at random and without probable cause* and if through ignorance, chance, skillful interrogation or through the force and compulsion inherent in the attending circumstances the officers are able to obtain sufficient incriminating admissions they then have legitimatized their illegal enterprise, admittedly undertaken in affront to the law and in violation of the Constitution, and have clothed it with the sanctity of "probable cause"—thereby not only validating the search but

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(Footnote 12, continued:)
of the *Carroll* case: " • • • the *Carroll* decision falls short of establishing a doctrine that, without such legislation (the Prohibition Act) automobiles nonetheless are subject to search without warrant in enforcement of all federal statutes." It intimated that the doctrine of the *Carroll* case might properly be restricted to those cases where Congress has expressly enacted a statute providing that a search without warrant under particular circumstances is reasonable. We are of the opinion that the *Carroll* case should properly be so restricted. We are not impressed that an automobile should be any more vulnerable to search without warrant than a person or fixed premises in the absence of legislation expressly so providing. There is no more justification to search an automobile because of cause to believe it contains contraband than to search fixed premises because of cause to believe it contains contraband. The law as to search should be no broader than the law as to arrest: for an offense committed in the presence of the arresting officer or for a felony of which the officer has reasonable cause to believe the defendant guilty. Experience has taught us that under any other rule—and this case is an example—officers are in fact encouraged to and do as a matter of practice stop and search on mere suspicion for the purpose of procuring evidence of law violation. It was primarily to prevent this very type of intrusion that the Fourth Amendment was demanded of the Government by the people.

However, we need not in this case overrule the *Carroll* case. Admitting for the purpose of this argument that the *Carroll* case is controlling, the opinion of the court below is in direct conflict with the rule therein pronounced.

making admissible in evidence against the citizen, both the statements and the evidence so obtained.

This Court, on the contrary, has *consistently* held that a search and seizure without warrant must be made upon probable cause *existing at the inception of the search* or it is unreasonable within the meaning of the Fourth Amendment.[13] The cases *do not* admit of any "retroactive effect" of after-acquired knowledge or information which may be added to admittedly insufficient knowledge so as to supply probable cause which was lacking in the original pursuit, arrest or intrusion.[14]

> "An officer gaining access to private living quarters under color of his office and of the law which he personifies *must then* have some valid basis in law for the intrusion. Any other rule would undermine 'the right of the people to be secure in their persons, houses, papers and effects,' and would obliterate one of the most fundamental distinctions between our form of government, where officers are under the law, and the police-state where they are the law." (Italics ours.)
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> *Johnson* v. *United States*, 333 U. S. 10.

To affirm the rule laid down by the Circuit Court of Appeals opinion is to make meaningless the rule of "probable cause." It opens wide the door to the most grave

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13. Carroll v. United States, 267 U. S. 132, 45 S. Ct. 280, 69 L. ed. 543; Pearson v. United States, (C. C. A. 10) 150 F. 2d 219; Johnson v. United States, 333 U. S. 10, 68 S. Ct. 367, 92 L. ed. 323; United States v. Di Re, *supra*, note 5; United States v. One 1937 Model Studebaker Sedan, (C. C. A. 10) 96 F. 2d 104.

14. Amos v. United States, 255 U. S. 313, 41 S. Ct. 266, 65 L. ed. 654; Byars v. United States, 273 U. S. 28, 47 S. Ct. 248, 71 L. ed. 520; Carroll v. United States, *supra*, note 13; Wisniewski v. United States, *supra*, note 6; Pearson v. United States, *supra*, note 13; United States v. O'Connell, 43 F. 2d 1005; Nueslein v. District of Columbia, *supra*, note 10; United States v. Di Re, *supra*, note 5; Johnson v. United States, *supra*, note 13.

abuses. It encourages exploratory searches. If the constitutional guarantee is to have any real meaning it must continue to be the rule, as this Court has always insisted it is, that in establishing "probable cause" for search without a warrant *the officer is necessarily limited to the facts and circumstances within his knowledge with which he initiates the search and that "probable cause" cannot be established upon the basis of subsequently discovered information by way of admission, or the discovery of contraband itself.*[15]

In the *Carroll* case, Chief Justice TAFT, speaking for this Court, lays down the test:

> "* * * we come now to consider under what circumstances such search may be made. It would be intolerable and unreasonable if a prohibition agent were authorized to stop every automobile on the chance of finding liquor, and thus subject all persons lawfully using the highways to the inconvenience and indignity of such a search. * * * But those lawfully within the country, entitled to use the public highways, have a right to free passage *without interruption or search unless there is known to a competent official authorized to search, probable cause* for believing that their vehicles are carrying contraband or illegal merchandise.
>
> * * * * * * * * *
>
> *"The measure of legality* of such a seizure is, therefore, that the seizing officer *shall have reasonable or probable cause for believing that the automobile which he stops and seizes had contraband liquor therein which is being illegally transported."* (Italics ours.)[16]

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15. Cases cited, *supra*, notes 13 and 14.

16. We respectfully suggest that the opinion below is also in direct conflict with the decision of the Fifth Circuit Court of Appeals in Moring v. United States, 40 F. 2d 267:

> "Those officers were on the highway near Falfurias, Tex., 75 or 100 miles from the Mexican border, when they saw two automobiles which they caused to stop by placing in the center of the highway a large sign upon which was printed, 'Stop, U. S.

(5)

Circuit Court Opinion Is in Conflict With the *Nueslein, Hanley* and *Johnson* Cases as to What Constitutes "Search."

We respectfully submit that the holding of the Circuit Court is in direct conflict with the decision of the Circuit Court of Appeals for the District of Columbia in *Nueslein* v. *District of Columbia*, 115 F. 2d 690, the decision in *United States* v. *Hanley*, 50 F. 2d 465, and the decision of this Court in *Johnson* v. *United States*, 333 U. S. 10, 68 S. Ct. 367, 92 L. ed. 323.

The court in its opinion holds that *the search* did not commence until *after* the pursuit of petitioner was had and completed, his car was forcibly stopped and run into the ditch, the interrogatories propounded, and the admissions

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(Footnote 16, continued:)

Officers.' Appellant was the owner of both automobiles. He was riding in the one in the front, and the one in the rear was being driven by another under his direction. Search was made without appellant's consent, and the liquor that was seized was found in the automobile in which he was not riding.

"The officer had no reasonable cause to believe or suspect that either of the automobiles contained liquor, but stopped them to see whether they did or not. Under these circumstances we are of opinion *that they were without authority of law to stop or search* the automobiles, and that it was error to base a conviction upon evidence seized upon such search." (Emphasis ours.)

We believe that in the *Carroll* case and numerous other decisions this Court has clearly said to the lower courts and to the law enforcement officers: "Agents of the Alcohol Tax Unit have no right or authority in law without warrant and without probable cause, no matter how strong their suspicion, to stop citizens upon the highway for the purpose of searching the vehicle for contraband or evidence of violation of law." Yet it appears that the voice of the Court has not been heard or at least not understood. *It is in the original pursuit and stopping that lies the basic illegality.* Carroll v. United States, *supra*, note 13; Wisniewski v. United States, *supra*, note 5; Pearson v. United States, *supra*, note 5. *Cf*: Carr v. United States, (C. C. A. 2) 59 F. 2d 991; United States v. Hanley, (C. C. A. 5) 50 F. 2d 465.

obtained; that *then* or at some time thereafter the search was commenced. (R. 37)[17]

Both as a matter of fact, and as a matter of law, this is basic error! It begs of no genuine dispute that when the officers commenced their chase their "chief object"—their single purpose and intent was to search that car! *The search began when they commenced the pursuit.*[18] This is the crux of the matter. The force, compulsion and coercion attending the surrounding circumstances was continuing throughout. The statement of Brinegar relative to his possession of whiskey: "Not too much," subsequent to the initiation of an unlawful search, after he had been unlawfully arrested[19]

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17. The record is replete that the "search began when they (the officers) commenced the pursuit." Such was the position of the Government, both in the trial court and before the Circuit Court of Appeals. (R. 7-11, 21, 23-26, and statement by Government's attorney, R. 12-13). "That they would have searched his car in any event is borne out by the position the Government takes in this appeal, that the condition of the car at the time they first observed it, plus the fact that Brinegar had the reputation with the Alcohol Tax Unit agents of dealing in liquor, constituted probable cause warranting a search without a warrant." (Per HUXMAN, dissenting opinion, R. 42.) This was the position of the Government on application to this Court for writ of certiorari. ("* * * *non constat* the holding below, it seems clear that the officers in the present case had reasonable cause to stop petitioner's car." Brief of United States in opposition, p. 5.) Such an erroneous conclusion of fact is basic to the error here involved. We do not admit that there exist *two* rules of probable cause: (1) probable cause to *stop* petitioner's car, and (2) probable cause to *search* petitioner's car. *The search commences with the pursuit; the stopping of the car is incident to the search. Cf:* Henderson v. United States, 12 F. 2d 528; Hoppes v. State, (Okl. Cr.) 105 P. 2d 433.

18. Nueslein v. District of Columbia, 115 F. 2d 690; United States v. Hanley, (D. C. N. Y.) 50 F. 2d 465. ("The facts in this case are indistinguishable in principle from those in these two cases." HUXMAN, J., dissenting opinion, R. 42.) Johnson v. United States, *supra*, note 4; Edwards v. State, (Okl. Cr.) 177 P. 2d 143; Black v. State, 63 Okl. Cr. 317, 74 P. 2d 1172; Hoppes v. State, 70 Okl. Cr. 179, 105 P. 2d 433; Evans v. State, 71 Okl. Cr. 239, 110 P. 2d 621.

19. See authorities note 23. This is the law of Oklahoma.

and was in the custody of the Federal Officers was not "voluntarily made." There was no true volition; it was compelled by the circumstances in which he found himself, and is tinged with official coercion.[20] The law does not require a citizen in such position to *resist arrest*, to engage in public in a futile contest with the police as to its legality, or refuse to be co-operative; even submissive. It does not require a misdemeanant brazenly to lie to the officer. It is right and proper that upon being taken into custody he recognize the authority of the lawfully appointed agents of his Government:

> "It is the right of one placed under arrest to submit to custody and to reserve his defenses for the neutral tribunals erected by the law for the purpose of judging his case."
>
> —*United States* v. *Di Re, supra.*

Under the authority of the *Johnson, Nueslein* and *Hanley* cases, as a matter of fact,[21] *these acts constituted a*

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20. Amos v. United States, 255 U. S. 313, 41 S. Ct. 266, 65 L. ed. 654; United States v. Baldocci, (D. C. S. D. Cal.) 42 F. 2d 567; Ray v. United States, (C. C. A. 5) 84 F. 2d 654; Duncan v. Commonwealth, 198 Ky. 841, 250 S. W. 101; United States v. Hoffenberg, (D. C. N. Y.) 24 F. Supp. 989; Edwards v. State (Okl. Cr.) 177 P. 2d 144; The People v. Lind, 370 Ill. 131, 18 N. E. 2d 189; Graham v. State, (Okl. Cr.) 184 P. 2d 984; Hoppes v. State, (Okl. Cr.) 105 P. 2d 433. *Cf.* Henderson v. United States, (C. C. A. 4) 12 F. 2d 528.

21. "By admission of the agents themselves, they did not pursue this car for the purpose of arresting Brinegar. Their testimony makes that very clear. They had no warrant for his arrest. They did not see him commit an act of law violation which would have warranted them in arresting him without a warrant. * * * What for then did they pursue him down the road with their siren screeching and crowd him off the highway, place him under restraint, and make it impossible for him to proceed. There can only be one answer—to ascertain whether he had whisky. *Ascertaining this constituted a search.* Is there anyone so naive as to believe that if he had answered that he had no whisky that they would have apologized, begged his pardon

search! A search admittedly *illegal* because found by both the trial court and the Circuit Court of Appeals to be wholly without probable cause.

> "Entry to defendant's living quarters, *which was the beginning of the search*, was demanded under color of office." (Italics ours.)
>
> *Johnson* v. *United States, supra.*

(6)

Circuit Court Opinion in Conflict With *Di Re* and *Johnson* Cases as to Law of "Arrest."

We respectfully submit that the holding of the Circuit Court of Appeals as to the matter of "arrest" is in direct conflict with the decisions of this Court in the *Di Re* and *Johnson* cases.[22]

There can no longer be any question but that in the absence of an applicable Federal statute the law of the state where an arrest without warrant takes place determines its existence and validity. Under the law of Oklahoma it is well settled that when the officers gave chase and pursued Brinegar for a distance of a mile or a mile and a quarter, opened up their siren, "forced him off the road" and into the ditch, without probable cause and absent an offense hav-

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(Footnote 21, continued:)

for having violated his constitutional rights as well as their oath of office to respect the Constitution, and permitted him to proceed? That they would have searched his car in any event is borne out by the position the Government takes in this appeal, that the condition of the car at the time they first observed it, plus the fact that Brinegar had the reputation with the Alcohol Tax Unit agents of dealing in liquor, constituted probable cause warranting a search without a warrant. In other words, they intended to search this car, and *the search was on when the chase began* and Brinegar was crowded off the road and prevented from going his lawful way as far as the Alcohol Tax Unit agents were concerned." (R. 41-42) (Emphasis ours.)

22. 332 U. S. 581; 333 U. S. 10.

ing been committed in the presence of the officers, Brinegar was under an unlawful arrest.[23] *Hoppes* v. *State*, 70 Okl.

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23. Under the law of Oklahoma a citizen's car may not be stopped on suspicion and his person or car searched in order to procure evidence against him. A search or arrest without a warrant can be valid only if for an offense committed in the presence of the arresting officer or for a felony of which he had reasonable cause to believe the defendant guilty. Hoppes v. State, 70 Okl. Cr. 179, 105 P. 2d 433; Ingraham v. State, 48 Okl. Cr. 178, 290 P. 344; Graham v. State, (Okl. Cr.) 184 P. 2d 984; Childress v. State, 31 Okl. Cr. 208, 238 P. 218; Leary v. State, (Okl. Cr.) 67 P. 2d 972; Edwards v. State, (Okl. Cr.) 177 P. 2d 143; Keith v. State, 30 Okl. Cr. 168, 235 P. 631; Evans v. State, 71 Okl. Cr. 239, 110 P. 2d 621; Ketcham v. State, 63 Okl. Cr. 428, 75 P. 2d 1159; Tucker v. State, 62 Okl. Cr. 406, 71 P. 2d 1092; Browdry v. State, 64 Okl. Cr. 86, 77 P. 2d 753; Black v. State, 63 Okl. Cr. 317, 74 P. 2d 1172. The fact that defendant was conveying liquor, not being discoverable without a search, the offense of conveying was not committed in the presence of the officers. Sowards v. State, 27 Okl. Cr. 431, 259 P. 157; Leary v. State, (Okl. Cr.) 67 P. 2d 972, and cases cited *supra*.

The following propositions, it is respectfully submitted, are clearly settled by statute and decision as the law of the state:

Where officers pursue an automobile on the highway, sound their siren as a result of which the driver stops his car and submits to the restraint of the officers an arrest is then and there consummated.

Where officers pursue an automobile lawfully on the highway, compel the driver to stop his car by forcing him off the road, place him in restraint and prevent the further progress of his car an arrest is then and there consummated.

Where such an arrest without warrant is made without probable cause or the commission of any offense in the presence of the officer the arrest is unlawful and a search incident or subsequent thereto is unreasonable and illegal.

Where the officer becomes aware of the facts constituting the offense *after* making an unlawful arrest the arrest cannot be justified as being for an offense committed in his presence.

Voluntary statements or admissions, if any, made by the defendant following such an unlawful arrest are incompetent and inadmissible on a motion to suppress the evidence.

The search commenced with the pursuit and the illegal search and pursuit cannot be legalized or justified by any subsequent admission, waiver, commission of an offense or the discovery of the contraband.

Hoppes v. State, 70 Okl. Cr. 179, 105 P. 2d 433;
Evans v. State, 71 Okl. Cr. 239, 110 P. 2d 621;
Edwards v. State, (Okl. Cr.) 177 P. 2d 143;

Cr. 179, 105 P. 2d 433; *Evans* v. *State*, 71 Okl. Cr. 239, 110 P. 2d 621.

Although the Oklahoma law requires the commission of an offense in the presence of the officer as justification for search without a warrant, while under the Federal rule as laid down in the *Carroll* case only "probable cause" is required, the absence of either probable cause or the commission of an offense in the presence of the A. T. U. agents makes the Oklahoma decision of *Hoppes* v. *State* a case in point. The conclusion obtained by the Criminal Court of Appeals of Oklahoma is in accord with the decisions of this Court and particularly the *Johnson* case. There as here there was a pursuit, a stopping and investigation. There as here there was obtained a purported voluntary statement by the defendant as to the presence of intoxicating liquor in her car. We quote at length:

"Counsel for the state in their brief argue that it

(Footnote 23, continued:)

Bohannon v. State, 66 Okl. Cr. 190, 90 P. 2d 675;
Hamner v. State, 44 Okl. Cr. 249, 280 P. 475;
Ingraham v. State, 48 Okl. Cr. 178, 290 P. 344.

"*Arrest Defined.* Arrest is the taking of a person into custody, that he may be held to answer for a public offense."

22 Okla. Stats. Ann., Sec. 186; Sec. 186, Code of Criminal Procedure.

"*Arrest, How Made.* An arrest is made by an actual restraint of the person of the defendant, or by his submission to the custody of the officer."

22 Okla. Stats. Ann., Sec. 190; Sec. 190, Code of Criminal Procedure.

"*Arrest Without Warrant by Officer.* A peace officer may, without a warrant, arrest a person: 1. For a public offense, committed or attempted in his presence. 2. When the person arrested has committed a felony, although not in his presence. 3. When a felony has in fact been committed, and he has reasonable cause for believing the person arrested to have committed it. 4. On a charge, made upon reasonable cause, of the commission of a felony by the party arrested."

22 Okla. Stats. Ann., Sec. 196; Sec. 196, Code of Criminal Procedure.

makes no difference whether an attempt to search began or a search began before the defendant's car was stopped, because when the officers went to the side of the car, *before any actual search, or before any arrest was made, the defendant told* deputy sheriff, Porter, she had a load of liquor and was trying to get away with it, there had been no arrest up to that time. And if the officers had acted illegally in pursuing her, then the illegal acts of the officers may be separated from their legal acts, and they had the right, after being informed by the defendant that the offense was being committed by the defendant, to look into the car and see the whisky, and arrested the defendant.

"It is also urged that the statement of the defendant was equivalent to the officers seeing the offense committed in their presence, therefore it makes no difference whether under the theory of the law the search had been begun before the officers stopped the defendant's car.

"With this contention we cannot agree. *In our opinion it is immaterial whether or not any verbal admission was made by the defendant following her arrest,* if in fact the defendant was not committing an offense in the presence of the officers before she was arrested. (In this case—lack of probable cause.) *If the arrest was unlawful any verbal admission, if any, made by the defendant following such arrest, was incompetent and inadmissible on a motion to suppress the evidence.* (Parenthetical insert ours.)

* * * * * * *

"*When the officers started in pursuit, they began an effort to search,* and tested by the above statutory provisions (see note 23) *when the officers sounded the siren, and defendant stopped her car and submitted to the custody of the officers, the arrest was then and there consummated.* The search that followed was an incident thereto.

"It necessarily follows from the foregoing review that upon the admitted and undisputed facts, the arrest of the defendant was unlawful, the search was therefore unreasonable." (Italics ours.)

(7)

The Circuit Court Opinion Is in Conflict With the *Nueslein* Case and the Federal Rule of Admissibility.

By a reasoning which we submit to be specious and which, as above pointed out, overlooks the basic considerations involved, the Circuit Court held that notwithstanding the absence of probable cause for search at the inception of the chase, the subsequent "voluntary admission" of Brinegar, made after being unlawfully stopped and arrested, related back and could be added to the insufficient knowledge previously had by the Federal agents so as to supply probable cause for the search and seizure, and that the admissions and evidence secured by such search are admissible in evidence against the defendant.[24]

It is impossible to reconcile the opinion below with the decision of the Circuit Court of Appeals in *Nueslein* v. *District of Columbia,* 115 F. 2d 690, the decision in *United States* v. *Hanley,* 50 F. 2d 465, and the opinion of this Court in the *Johnson* case.

The *Nueslein* opinion, it is respectfully submitted, flatly holds that the evidence obtained through a *voluntary* declaration of fact by officers engaged in a search without probable cause and in violation of the Fourth Amendment is inadmissible in evidence as against a defendant in a criminal

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24. We respectfully submit that the opinion in the *Johnson* case clearly refutes the proposition that Federal officers by virtue of illegal action may subsequently and by virtue thereof obtain sufficient information so as to provide probable cause and thereby legalize or justify the original illegality.

prosecution. In that opinion Mr. Chief Justice VINSON exhaustively reviews the historical background, the conflict existing between the common law, certain state decisions, and the Federal rule, the scope, meaning and purpose of the Fourth and Fifth Amendments and the fundamental policy which had determined the Federal rule of exclusion. In our opinion Mr. Chief Justice VINSON in the *Nueslein* case has declared basic constitutional policy. It is the rule envisaged by the decisions of this Court.[25] It is the well established Federal rule.[26]

We respectfully join with Judge HUXMAN in subscribing to the philosophy of the *Nueslein* case[27] and urge upon this Court its declaration as to the rule prevailing in *all* the Courts of the United States.

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25. Amos v. United States, 255 U. S. 313, 41 S. Ct. 266, 65 L. ed. 654; Gouled v. United States, 225 U. S. 298, 41 S. Ct. 261, 65 L. ed. 647; Johnson v. United States, *supra;* Boyd v. United States, 116 U. S. 616, 6 S. Ct. 524, 29 L. ed. 746; Weeks v. United States, 232 U. S. 383, 34 S. Ct. 341, 58 L. ed. 652.

26. Nueslein v. District of Columbia, *supra;* U. S. v. Hanley, *supra;* U. S. v. Setaro, (D. C. Conn.) 37 F. 2d 134; In re Oryell, (D. C. N. Y.) 28 F. 2d 639; In re Fried, (C. C. A. 2) 161 F. 2d 453; Moring v. United States, (C. C. A. 5) 40 F. 2d 267; Worthington v. United States, (C. C. A. 6) 166 F. 2d 557. ("The Fourth Amendment does not exclude from its protection a woman of the underworld. Police officers can no more violate her rights under the Constitution than they can violate those of any other person. We have heard enough in these last years, throughout the world, of the knock on the door in the nighttime, the arrest, the ransacking search, and the prison cell, to take warning. The constitutional rights of everyone are immediately imperiled when the rights, of even the outcast, the disdained, and the powerless, are trampled over with impunity. Violation of the safeguards, guaranteed by the Bill of Rights, is not to be trifled with, or lightly considered, no matter who the victim be. Such abuse must be struck down, without palliation, in its beginning.") It is also the Oklahoma rule. Hoppes v. State, *supra.*

27. As the sole authority for its conclusion to the contrary the opinion of the Circuit Court of Appeals cites its own decision in Morgan v. United States, 159 F. 2d 85. By *a fortiori* reasoning, if the decision

We respectfully pray the order of this Court reversing and remanding this cause to the District Court for the Northern District of Oklahoma with directions to sustain the motion to suppress; or in the alternative an order to the Circuit Court of Appeals for the Tenth Circuit to issue its mandate to the District Court consistent with the opinion of this Court.

Respectfully submitted,

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CHARLES A. WHITEBOOK,
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Of Counsel.

(Footnote 27, continued)

in this case is wrong and the *Morgan* case is to the same effect, then the *Morgan* case is also erroneously determined. However, we respectfully point out to the Court that the *Morgan case is no authority* and does not involve the question here presented. The point was neither presented to nor determined by the court in that case. The opinion on its face discloses that the judgment of the lower court was there reversed *solely* on the ground that the motion for directed verdict as to Count 2 should have been sustained. *The jury had acquitted appellant of the charge under Count 1.* Under well established rules of construction, that part of the opinion relating to "arrest" not being determinative nor necessary to the holding or decision is *dicta.* Additionally, it is submitted that it is in conflict with and is overruled by the subsequent opinions of this Court in the *Di Re* and *Johnson* cases. The opinion in the *Morgan* case was written for the Court by Judge HUXMAN. Certainly he is in position to state the matter then before the Court and which was by the *Morgan* opinion determined. In his well reasoned dissent in this case Judge HUXMAN says:

> "The facts in the *Morgan* case are not nearly as strong on the question of pursuit as they are in this case. But in any event *this precise point was not raised or decided in that case.* * * * The *Morgan* case is not authority for the proposition that a voluntary admission, obtained while officers were engaged in a search in violation of the Fourth Amendment, is admissible." (Italics ours.) (R. 43)

In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 551

VIRGIL T. BRINAGER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The majority and dissenting opinions in the circuit court of appeals (R. 39–47) have not yet been reported. The oral opinion of the district court overruling petitioner's motion to suppress evidence appears at pp. 13–15 of the record.

JURISDICTION

The judgment of the circuit court of appeals was entered December 10, 1947 (R. 47–48). A petition for rehearing (R. 51–59) was denied January 2, 1948 (R. 61). The petition for a writ of certiorari was filed January 27, 1948. The jurisdiction of this Court is invoked under Sec-

tion 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules 37 (b) (2) and 45 (a), F. R. Crim. P.

QUESTION PRESENTED

Whether there was probable cause for the search of petitioner's automobile.

STATEMENT

Petitioner was convicted on an information filed against him in the United States District Court for the Northern District of Oklahoma, charging the unlawful importation of intoxicating liquor into the State of Oklahoma from the State of Missouri in violation of Section 3 of the Liquor Enforcement Act of June 25, 1936, c. 815, 49 Stat. 1928 (27 U. S. C. 223) (R. 1–2, 3). He was sentenced to imprisonment for 30 days and to pay a fine of $100 (R. 4). On appeal, the judgment was affirmed, one judge dissenting (R. 47–48).

Before trial, petitioner moved to suppress the use in evidence of the liquor on which the prosecution was based on the ground that it had been obtained as the result of an unlawful search and seizure (R. 2).

The facts adduced at a hearing on the motion may be summarized as follows:

On March 3, 1947, two investigators of the Alcohol Tax Unit were, about 6 p. m., stationed in a car near the Quapaw Bridge in north Oklahoma, about three or four miles west of the Missouri

line (R. 8; see R. 11, 13).[1] As petitioner passed the agents in his Ford coupe (R. 7), coming from the east, i. e., from the direction of Missouri, one of the agents recognized him as the man whom he had arrested about a month before for hauling liquor (R. 8). The agent had also seen petitioners loading liquor at Joplin, Missouri, at other times, and knew him to have a reputation for hauling liquor (R. 8).[2] Both agents testified that petitioner's car appeared to be loaded or weighted down (R. 8, 11).

As he passed the agents, petitioner "increased his speed at that moment," and the agents gave chase (R. 11, 8). Although the agents' car was "going as fast as it could" they "were not gaining * * * at all," until his car began skidding on a hill and he slowed down (R. 8–9). The agents then gained on petitioner, sounded the siren, and crowded petitioner's car to the side of the road where he stopped (R. 9, 11).

The agents got out of their car and as they approached petitioner, one of them asked "How much liquor have you got in the car this time," and petitioner replied, "Not too much" (R. 7, 9).

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[1] At the trial, one of the agents testified that the road on which they were stationed is a gravel road which runs directly east from Quapaw, Oklahoma, and that it has a number of curves, crosses the bridge, and then continues east into Missouri, connecting with the Missouri highway from Joplin to Seneca (R. 17).

[2] This agent testified at the trial that he recognized petitioner's car, which he "had seen before in Joplin," when the car passed the agents (R. 18).

After some questioning, petitioner said that there were 12 cases in the car (R. 11–12). One case was on the front seat. Petitioner testified that it was covered with a lap robe (R. 7), but one of the agents stated that it was open to view from outside the car (R. 9, 10). Twelve cases were found under and in back of the front seat (R. 7, 9).

The agents then placed petitioner under arrest (R. 9).

The district judge was of the opinion that the agents did not have sufficient probable cause to justify a search of the automobile before they stopped the car, since they were relying primarily on the fact that petitioner was known to be a bootlegger. He held, however, that petitioner's voluntary admissions, made after the car had been stopped, constituted probable cause for a search, and that the detention of petitioner by stopping his car, whether it be deemed an arrest or not, did not vitiate petitioner's voluntary statements as justifying the search. He accordingly ruled that the evidence was admissible. (R. 13–15.)

The circuit court of appeals (one judge dissenting) was of the same view. They thought that the facts within the knowledge of the agents prior to the time petitioner made the incriminating statements did not constitute probable cause for a search, but that, having stopped the car for the purpose of investigating, the agents

could then rely on petitioner's voluntary statements, which did furnish probable cause for the search (R. 41–44).

ARGUMENT

Whether the facts in the present case bring the rationale of the opinion below within the ruling in *Johnson* v. *United States*, No. 329, this Term, decided February 2, 1948, does not, in our view, present a case for certiorari. In any event, it is unnecessary to consider the correctness of the expressed rationale of the decision, because, *non constat* the holding below, it seems clear that the officers in the present case had reasonable cause to stop petitioner's car. The totality of the circumstances upon which we base this contention are:

The agents knew from previous observations and contact with petitioner that he was a liquor hauler. He passed the agents' car in the late afternoon on a gravel, tortuous, back road which led from wet Missouri into dry Oklahoma, only three or four miles from the Missouri line. The car appeared to the agents to be loaded or weighted down. When petitioner saw the agents he took flight (R. 11) and was overtaken only when he had to slow his car to avoid skidding on a hill. The element of flight was, we submit, too significant an element in appraising the reasonableness of the officers' action to be disregarded, as it was below.

As the Circuit Court of Appeals for the Second Circuit, speaking through L. Hand, J., stated in *United States* v. *Heitner*, 149 F. 2d 105, 107 (C. C. A. 2), certiorari denied *sub nom. Cryne* v. *United States*, 326 U. S. 727, a case which involved the similar question of flight as furnishing probable cause for the arrest of men who fled in an automobile at high speed after observing police officers, "it has long been recognized that flight, like the spoliation of papers, is a legitimate ground for the inference of guilt" [citing cases]. Certainly if a court and jury may consider flight as a factor in determining *guilt* of a defendant, *a fortiori* an officer of the law may rely on flight as strong evidence of probable cause. As the court stated in the *Heitner* case (149 U. S., at 106–107) "indeed, the 'reasonable cause' necessary to support an arrest cannot demand the same strictness of proof as the accused's guilt upon a trial, * * *." "* * * it has at no time been doubted that flight is a circumstance from which a court or an officer may infer what everyone in daily life inevitably would infer." In the circumstances of this case, in which a known bootlegger fled in an apparently overloaded car along a back road leading into dry territory, it would seem clear that the officers had probable cause to believe that he was carrying liquor.

We do not have here involved the search of a person's home or apartment without a war-

rant. We have here, it seems to us, the situation in which this Court so recently in the *Johnson* case, *supra*, indicated, by way of contrast, that a warrant to search is not required to satisfy the Fourth Amendment. To quote from the slip opinion (pp. 4–5):

> There are exceptional circumstances in which, on balancing the need for effective law enforcement against the right of privacy, it may be contended that a magistrate's warrant for search may be dispensed with. But this is not such a case. No reason is offered for not obtaining a search warrant except the inconvenience to the officers and some slight delay necessary to prepare papers and present the evidence to a magistrate. These are never very convincing reasons and, in these circumstances, certainly are not enough to by-pass the constitutional requirement. *No suspect was fleeing or likely to take flight.* The search was of permanent premises, *not of a movable vehicle.* No evidence or contraband was threatened with removal or destruction, except perhaps the fumes which we suppose in time would disappear. But they were not capable at any time of being reduced to possession for presentation to court. The evidence of their existence before the search was adequate and the testimony of the officers to that effect would not perish from the delay of getting a warrant. [Italics supplied.]

CONCLUSION

The case involves nothing more than the application of settled principles to particular facts and, therefore, we do not think it is one which requires further exposition of the federal law of search and seizure.

Respectfully submitted.

PHILIP B. PERLMAN,
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FEBRUARY 1948.

U. S. GOVERNMENT PRINTING OFFICE: 1948

No. 12

In the Supreme Court of the United States

OCTOBER TERM, 1948

VIRGIL T. BRINEGAR, PETITIONER,

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES

INDEX

CITATIONS

Cases:

In the Supreme Court of the United States

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VIRGIL T. BRINEGAR, PETITIONER,

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinions in the circuit court of appeals (R. 36-44) are reported at 165 F. 2d 512. The oral opinion of the district court overruling petitioner's motion to suppress evidence appears at pp. 12-14 of the Record.

JURISDICTION

The judgment of the circuit court of appeals was entered December 10, 1947 (R. 44-45). A petition for rehearing was denied January 2, 1948

(R. 47). The petition for a writ of certiorari was filed January 27, 1948, and certiorari was granted March 8, 1948 (R. 49). The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules 37(b)(2) and 45(a), F. R. Crim. P.

QUESTIONS PRESENTED

1. Whether a moving vehicle may be searched without a warrant on probable cause to believe that it is being used to carry contraband.

2. Whether there was probable cause for the search of petitioner's automobile.

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

The Fourth Amendment and the statutes involved are set out in the Appendix, *infra*, pp. 24-26.

STATEMENT

Petitioner was convicted on an information filed against him in the United States District Court for the Northern District of Oklahoma, charging the unlawful importation of intoxicating liquor into the State of Oklahoma from the State of Missouri, in violation of Section 3 of the Liquor Enforcement Act of 1936, Appendix, *infra*, pp. 24 and 25 (R. 1-2, 3). He was sentenced to imprisonment for 30 days and to pay a fine of $100 (R. 4). On appeal, the judgment was affirmed (R. 44-45), one judge dissenting (R. 41-44).

Before trial, petitioner moved to suppress the use in evidence of the liquor on which the prose-

cution was based on the ground that it had been obtained as the result of an unlawful search and seizure (R. 2).

The facts adduced at a hearing on the motion may be summarized as follows:

On March 3, 1947, two investigators of the Alcohol Tax Unit were, about 6 p. m., stationed in a car near the Quapaw Bridge in north Oklahoma, about three or four miles west of the Missouri line (R. 7-8, 12).[1] As petitioner passed the agents in his Ford coupe coming from the east, i.e., from the direction of Missouri, one of the agents recognized him as the man whom he had arrested about a month before for hauling liquor (R. 7-8). The agent had also seen petitioners loading liquor at Joplin, Missouri, at other times, and knew him to have a reputation for hauling liquor (R. 7).[2] Both agents testified that petitioner's car appeared to be loaded or weighted down (R. 8, 10).

As he passed the agents, petitioner "increased his speed at that moment," and the agents gave chase (R. 10, 8). Although the agents' car was "going as fast as it could" they "were not gaining

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[1] At the trial, one of the agents testified that the road on which they were stationed is a gravel road which runs directly east from Quapaw, Oklahoma, and that it has a number of curves, crosses the bridge, and then continues east into Missouri, connecting with the Missouri highway from Joplin to Seneca (R. 16).

[2] This agent testified at the trial that he recognized petitioner's car, which he "had seen before in Joplin," when the car passed the agents (R. 17).

* * * at all," until petitioner's car began skidding on a hill and he slowed down (R. 8). The agents then gained on petitioner, sounded the siren, and crowded petitioner's car to the side of the road where he stopped (R. 8, 10). Petitioner admitted that he saw the agents' car at the bridge (R. 7).

The agents got out of their car and as they approached petitioner, one of them asked "How much liquor have you got in the car this time," and petitioner replied, "Not too much" (R. 7, 8). After some questioning, petitioner said that there were 12 cases in the car (R. 11). One case was on the front seat. Petitioner testified that it was covered with a lap robe (R. 7), but one of the agents stated that it was open to view from outside the car (R. 8, 9). Twelve cases were found under and in back of the front seat (R. 7, 9).

The agents then placed petitioner under arrest (R. 9).

The district judge was of the opinion that the agents did not have sufficient probable cause to justify a search of the automobile before they stopped the car, since they were relying primarily on the fact that petitioner was known to be a bootlegger. He held, however, that petitioner's voluntary admissions, made after the car had been stopped, constituted probable cause for a search, and that the detention of petitioner by stopping his car, whether it be deemed an arrest or not, did not vitiate petitioner's voluntary statements as justi-

fying the search. He accordingly ruled that the evidence was admissible (R. 12-14.)

The circuit court of appeals (one judge dissenting) was of the same view. They thought that the facts within the knowledge of the agents prior to the time petitioner made the incriminating statements did not constitute probable cause for a search, but that, having stopped the car for the purpose of investigating, the agents could then rely on petitioner's voluntary statements, which did furnish probable cause for the search (R. 36-41).

SUMMARY OF ARGUMENT

I. The search of a moving vehicle without a warrant on probable cause to believe that it is being used to transport contraband is a reasonable search within the purview of the Fourth Amendment. *Carroll* v. *United States*, 267 U. S. 132, 153. That doctrine has not hitherto been deemed to rest on statutory justification. The basic rationale of the *Carroll* decision, and of subsequent decisions by this Court and lower federal courts, is that such a search of a moving vehicle without a warrant is reasonable because the securing of a warrant is not practicable inasmuch as the vehicle may disappear before a warrant can be obtained.

In any event, as to the particular offense here involved, there is statutory justification for the search in Section 4 of the Liquor Enforcement Act of 1936, which directs the seizure and forfeiture of vehicles used in violation of that act. This

Court has held that authority to seize necessarily implies authority to search on probable cause. *United States* v. *Lee*, 274 U. S. 559; *Carroll* v. *United States*, 267 U. S. 132.

This power to search is not dependent on the power to arrest. *Carroll* v. *United States*, 267 U. S. 132, 158-159. Hence the state law of arrest has no relevancy to the problem at hand.

II. In the instant case, the facts within the knowledge of the agents at the time they stopped petitioner's automobile constituted probable cause to believe that it was being used to commit an offense under the Liquor Enforcement Act of 1936. Petitioner was a known liquor hauler and on the occasion in question he was observed driving a heavily loaded vehicle from a source of supply, wet Missouri, to the place where he plied his trade, dry Oklahoma. As soon as he saw the agents, he took flight, a circumstance which, on reason and authority, has always been deemed strongly suggestive of guilt. These facts are far more persuasive than those on which this Court found probable cause for the search of a moving vehicle in the *Carroll* case.

The conclusion of the courts below that there was insufficient probable cause for stopping petitioner's automobile is a legal conclusion upon undisputed facts, not a finding of fact based on the resolution of conflicting testimony. It is a conclusion reached only by completely disregarding the most significant of those undisputed facts, the fact

of flight. The conclusion is unreasonable on its face and disregards the controlling decisions of this Court.

III. Since we believe that the agents had probable cause for searching petitioner's automobile before they stopped it, we think it is unnecessary to reach the question on which the court below divided, i.e., whether petitioner's admissions, made after the car had been stopped but not searched, could be used as justification for the actual search. If the act of stopping the car was itself illegal, we believe that the decision of this Court in *Johnson* v. *United States*, 333 U. S. 10, compels the conclusion that the admissions made as the result of that illegal act could not be used as the basis for a search. And the decision of this Court in *Carroll* v. *United States*, 267 U. S. 132, 153-154, indicates that nothing less than probable cause will justify the search of a moving vehicle.

ARGUMENT

I

THE FOURTH AMENDMENT AUTHORIZES THE SEARCH OF A MOVING VEHICLE WITHOUT A WARRANT UPON PROBABLE CAUSE TO BELIEVE THAT THE VEHICLE IS BEING USED TO TRANSPORT CONTRABAND.

The search of a moving vehicle without a warrant on probable cause to believe that the vehicle is being used to transport contraband is a reasonable search within the purview of the Fourth

Amendment. This Court so held in *Carroll* v. *United States,* 267 U. S. 132, 153, pointing out that

> the guaranty of freedom from unreasonable searches and seizures by the Fourth Amendment has been construed, practically since the beginning of the Government, as recognizing a necessary difference between a search of a store, dwelling house or other structure in respect of which a proper official warrant readily may be obtained, and a search of a ship, motor boat, wagon or automobile, for contraband goods, where it is not practicable to secure a warrant because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought.

See also *Husty* v. *United States,* 282 U. S. 694, 700, where this Court said

> The Fourth Amendment does not prohibit the search, without warrant, of an automobile, for liquor illegally transported or possessed, if the search is upon probable cause; and arrest for the transportation or possession need not precede the search.

There is a suggestion in the recent decision of this Court in *United States* v. *Di Re,* 332 U. S. 581, 585, that the *Carroll* doctrine is limited to situations in which searches of moving vehicles are specifically authorized by statute. We cannot so read the *Carroll* decision. Obviously, a statute cannot enlarge the scope of a constitutional amend-

ment. And the *Carroll* decision, as we read it, referred to the early statutes authorizing searches of moving vehicles without warrants, merely as reflecting the understanding of the Fourth Amendment by contemporary legislators, not as enlarging the definition of a reasonable search under that amendment.

Certainly the courts, including this Court, have not heretofore deemed the *Carroll* principle to be tied to any specific statutory provision. In *Scher* v. *United States*, 305 U. S. 251, 254, which arose after the repeal of prohibition, this Court applied the *Carroll* doctrine to a search of a moving vehicle upon reasonable cause to believe that it was being used in the transportation of non-taxpaid liquor, despite the absence of a statute similar to Section 26 of the National Prohibition Act, which specifically imposed on agents the duty to seize liquor being illegally transported. The Liquor Taxing Act of 1934 (Appendix, *infra*, p. 26), on which the *Scher* prosecution was based, merely made unlawful the transportation, possession, etc., of distilled spirits not bearing the proper stamps, and provided generally for the forfeiture of liquor found in containers not bearing the required stamps.

Similarly, the circuit courts of appeal have consistently applied the *Carroll* doctrine, not only to situations involving the transportation of liquor since the repeal of prohibition,[3] but to searches

[3] E.g., *United States* v. *One 1946 Plymouth Sedan*, 167 F. 2d 3 (C. C. A. 7); *One 1941 Ford ½ Ton Automobile Truck* v.

of moving vehicles reasonably believed to be carrying other contraband as well. *Coupe* v. *United States*, 113 F. 2d 145 (App. D. C.), certiorari denied, 310 U. S. 651 (lottery tickets); *Leong Chong Wing* v. *United States*, 95 F. 2d 903 (C. C. A. 9) (narcotics); *Stobble* v. *United States*, 91 F. 2d 69 (C. C. A. 7) (narcotics). In none of these decisions are there any intimations that the courts deemed it necessary to find statutory justification for a search of a moving vehicle. The rationale of the decisions is that on which we understand the *Carroll* case itself to rest, i.e., that a search of a moving vehicle without a warrant on probable cause is reasonable because the securing of a warrant is not reasonably practicable inasmuch as the vehicle may disappear before a warrant can be obtained. The recent decisions of this Court since the *DiRe* decision—*Johnson* v. *United States*, 333 U. S. 10, and *Trupiano* v. *United States*, No. 427, decided June 14, 1948—in which this Court has emphasized the necessity for securing a warrant where there is time to do so, impliedly recognize, we think, that a warrant is not necessary where, as here, the securing of a warrant is not reasonably practicable.

In any event, as to the particular offense here involved, if statutory authorization to search with-

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United States, 140 F. 2d 255 (C.C.A. 6); *Albertyv. United States*, 134 F. 2d 135 (C.C.A. 10); *Jones* v. *United States*, 131 F. 2d 539 (C.C.A. 10); *United States* v. *Sebo*, 101 F. 2d 889 (C.C.A. 7); *Poulas* v. *United States*, 95 F. 2d 412 (C.C.A. 9); *Rodriguez* v. *United States*, 80 F. 2d 646 (C.C.A. 5).

out a warrant is necessary, such authority exists. Section 4 of the Liquor Enforcement Act of 1936, Appendix, *infra*, p. 25, provides:

> All intoxicating liquor involved in any violation of this Act * * * and every vehicle or vessel used in the transportation thereof, shall be seized and forfeited. Such seizure and forfeiture, and the disposition of such property subsequent to seizure and forfeiture, or the disposition of the proceeds from the sale of such property, shall be in accordance with existing laws or those hereafter in existence relating to seizures, forfeitures, and dispositions of property or proceeds, for violation of the internal-revenue laws.

This is not very different from Section 26 of the National Prohibition Act, Appendix, *infra*, pp. 25-26, the statute involved in the *Carroll* case, which provided that when law enforcement officers "shall discover any person in the act of transporting" intoxicating liquors in any vehicle in violation of law, the liquor and vehicle should be seized, and the person in charge thereof arrested. As in this case, the statute specifically directed seizure without expressly authorizing a search, but the Court found in the authority to seize the authority to search. See also *United States* v. *Lee*, 274 U. S. 559, 562, where this Court held that authority to seize necessarily implied authority to search on probable cause. This Court there said:

> * * * Officers of the Coast Guard are authorized, by virtue of Revised Statutes, § 3072,

> to seize on the high seas beyond the twelve-mile limit an American vessel subject to forfeiture for violation of any law respecting the revenue. * * * From that power it is fairly to be inferred that they are likewise authorized to board and search such vessels when there is probable cause to believe them subject to seizure for violation of revenue laws, and to arrest persons thereon engaged in such violation. * * *

Since in this case the statute requires seizure of a vehicle being used to transport liquor into a dry state, it also impliedly authorizes a search of such a vehicle upon probable cause to believe that it is being used for that illegal purpose. Hence the search of petitioner's automobile was lawful if there was probable cause to believe that it was being used in violation of the Liquor Enforcement Act of 1936.

The question at issue here is the right to search the vehicle, not the right to arrest the driver. In the *Carroll* case, this Court specifically held that the search of a moving vehicle may precede an arrest, and that the right to stop and search a vehicle is not dependent on the right to arrest. This Court there said, 267 U. S. at pp. 158-159:

> The right to search and the validity of the seizure are not dependent on the right to arrest. They are dependent on the reasonable cause the seizing officer has for belief that the contents of the automobile offend against the law.

See also *Husty* v. *United States*, 282 U. S. 694, 700.

Since, therefore, the search in this case was not dependent on the right to arrest, the state law of arrest has no relevancy to the basic issue in this case, i.e., the right of the officers to stop the car for the purpose of conducting a search. Petitioner himself so recognizes (see Br. 30), his discussion of the state law of arrest being directed at the subsidiary problem, discussed *infra*, pp. 19-22, as to whether, assuming lack of probable cause to stop the car, the search in this case could nevertheless be sustained. The question whether the search of a moving vehicle is a reasonable search under the Fourth Amendment is, as the *Carroll* case makes clear, a question of federal constitutional law, unaffected by the state law of arrest. Since, as we have shown, such a search based on probable cause is reasonable under the Amendment and, as to the offense here involved, authorized by federal statute, it is clearly a proper search under federal law.

II

THE AGENTS HAD PROBABLE CAUSE TO STOP AND SEARCH PETITIONER'S CAR

The fundamental issue in this case is, therefore, whether the facts within the knowledge of the agents at the time they stopped petitioner's automobile constituted probable cause to believe that it was being used to commit an offense under the Liquor Enforcement Act of 1936.

The legal principles which must govern that determination are not in dispute. The accepted definitions of probable cause are those adopted with approval from state cases by this Court in *Stacey* v. *Emery*, 97 U. S. 642, 645:

> * * * A reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief that the party is guilty of the offence with which he is charged.
>
> * * * Such a state of facts as would lead a man of ordinary caution to believe, or to entertain an honest and strong suspicion, that the person is guilty. * * *

Chief Justice Marshall in *Locke* v. *United States*, 7 Cranch 339, 348, defined probable cause thus:

> It is contended, that probable cause means prima facie evidence, or, in other words, such evidence as, in the absence of exculpatory proof, would justify condemnation. This argument has been very satisfactorily answered on the part of the United States, by the observation, that this would render the provision totally inoperative. It may be added, that the term "probable cause," according to its usual acceptation, means less than evidence which would justify condemnation; and, in all cases of seizure, has a fixed and well-known meaning. It imports a seizure made under circumstances which warrant suspicion. In this, its legal sense, the court must understand the term to have been used by Congress.

Or, as this Court, again quoting a state case, said in *Carroll* v. *United States*, 267 U. S. 132, 161, "The

substance of all the definitions is a reasonable ground for belief in guilt."

Applying these principles to the facts here presented, we submit that, as a matter of law, the agents had probable cause for stopping and searching petitioner's automobile. The agents knew from previous observations and contact with petitioner that he was a liquor hauler. He passed the agents' car in the late afternoon on a gravel, tortuous, back road which led from wet Missouri into dry Oklahoma, only three or four miles from the Missouri line. The car appeared to the agents to be loaded or weighted down. When petitioner saw the agents, he took flight and was overtaken only when he had to slow his car to avoid skidding on a hill. On the totality of these circumstances, we submit, a reasonable law enforcement officer was amply justified in concluding that petitioner was engaged in a violation of law.

The question at issue here is really foreclosed by the *Carroll* decision. In that case, prohibition agents knew that the defendants were bootleggers in Grand Rapids, because several months prior to the search, the defendants had agreed to sell liquor to the agents, although they failed to make delivery. The agents, on their regular tour of duty on the highway, saw the defendants in an automobile, which they identified from their previous contact with them, proceeding from Detroit to Grand Rapids. Detroit was known to be an active center

for the illegal introduction of liquor into the country. On these facts alone, this Court held that the agents had probable cause to stop and search the Carroll car. 267 U. S. at 134-136, 160.

The facts here clearly present a firmer basis for action than those proved in the *Carroll* case. Here, as in the *Carroll* case, the agents had information that petitioner was a known bootlegger. Here, as in the *Carroll* case, the agents saw petitioner driving from a known source of supply—wet Missouri—into the place where he plied his trade—dry Oklahoma. And here, there were in addition significant factors not present in the *Carroll* case—the fact that petitioner was driving a heavily loaded car on a back road and, even more important, the fact that he took flight the moment he saw that the agents were following him. The element of flight is, we submit, a very significant factor in appraising the reasonableness of the officers' action, an element which elevates the proof in this case far above that presented in the *Carroll* case. The disregard of this very significant factor by the courts below accounts, we think, for their erroneous conclusion that the agents did not have probable cause to search petitioner's automobile before they stopped it.

The courts have always recognized flight as a significant factor to be considered in determining probable cause for belief in guilt. *Husty* v. *United States*, 282 U. S. 694, 700-701; *Talley* v. *United*

States, 159 F. 2d 703 (C.C.A. 5); *Jones* v. *United States,* 131 F. 2d 539, 541 (C.C.A. 10); *Levine* v. *United States,* 138 F. 2d 627, 629 (C.C.A. 2). In *Thompson* v. *United States,* 44 F. 2d 165, 166 (C.C.A. 5), the court said that a driver's "apparent attempt to escape" by increasing his speed when he saw Federal agents would "naturally confirm" the officers' belief, based on information received from another, that the driver was carrying liquor. In *United States* v. *Lerner,* 35 F. Supp. 271, 274 (D. Md.), the court, although expressing doubt as to whether the circumstances preceding flight would have constituted probable cause, held that the defendant's flight, after the officers had identified themselves, was the decisive additional circumstance justifying an arrest and search. The court there said, "Flight is at least very suggestive of guilt." As the Circuit Court of Appeals for the Second Circuit, speaking through L. Hand, J., stated in *United States* v. *Heitner,* 149 F. 2d 105, 107 (C.C.A. 2), certiorari denied *sub nom. Cryne* v. *United States,* 326 U. S. 727, a case which involved a similar question of flight as furnishing probable cause for the arrest of men who fled in an automobile at high speed after observing police officers, "it has long been recognized that flight, like the spoliation of papers, is a legitimate ground for the inference of guilt" (citing cases). Certainly if a court and jury may consider flight as a factor in determining *guilt* of a defendant, *a fortiori* an

officer of the law may rely on flight as strong evidence of probable cause. As the court stated in the *Heitner* case (149 F. 2d at 106-107) "indeed, the 'reasonable cause' necessary to support an arrest cannot demand the same strictness of proof as the accused's guilt upon a trial, * * * * * * it has at no time been doubted that flight is a circumstance from which a court or an officer may infer what everyone in daily life inevitably would infer."

In the circumstances of this case, in which a known bootlegger fled in an apparently overloaded car along a back road leading into dry territory, it would seem clear that the officers had probable cause to believe that he was carrying liquor.

The conclusion of the courts below that there was insufficient probable cause to warrant the agents in stopping petitioner's car did not depend on the resolution of conflicting testimony. The significant facts in this case—petitioner's reputation, the road on which he was travelling, the appearance of his car, and the fact of flight—are not disputed. The holding of the courts below that probable cause did not exist is thus not a finding of fact, but a legal conclusion upon established facts. As appears from the opinions in both courts, that conclusion was reached only by completely disregarding one of the most significant of those undisputed facts, the fact of flight. The conclusion is unreasonable on its face, and disregards the

controlling decisions of this Court. It is, we submit, a conclusion which cannot be sustained.

III

SINCE THERE WAS PROBABLE CAUSE TO STOP PETITIONER'S AUTOMOBILE, IT IS UNNECESSARY TO CONSIDER WHETHER PETITIONER'S ADMISSIONS MADE AFTER THE CAR WAS STOPPED CAN BE USED AS JUSTIFICATION FOR THE SEARCH.

In the view we take of this case, that the agents had probable cause to stop and search petitioner's car before they talked with him, it becomes unnecessary to consider the question on which the court below divided, i.e., whether petitioner's admissions, made after the car had been stopped but not searched, may properly be considered in determining whether there was probable cause for the actual search. Although not so phrased in the decisions below, we think that question really amounts to this—whether a car may be stopped for the purpose of inquiry but not for search on the basis of suspicion not amounting to probable cause.

If the act of forcing petitioner to stop his car was itself an illegal act, the decision of this Court in *Johnson* v. *United States*, 333 U. S. 10, compels, we think, the conclusion reached by the dissenting judge below that petitioner's admissions could not be used as justification for the search of the car. In the *Johnson* case, a police officer who originally went to a hotel to investigate a report that opium was being smoked there, traced the odor of burn-

ing opium to the room of the manager of the hotel. The officer knocked on the door, stated that he wanted to talk to the manager, and was admitted. Finding in the room only one person who could reasonably have been believed to be in possession of smoking opium, the officer arrested her and searched the room. This Court held that the search commenced when the officer obtained entry to the room under color of his office, and that the entry and search were illegal. This Court further held that, since the officer had obtained entry by illegal means, evidence obtained by a search after the arrest of petitioner was not admissible, even though the facts immediately apparent to the officer's view when he entered the room quite clearly established that petitioner had recently committed a felony. Hence, in the instant case, if the act of the agents in forcing petitioner to stop his car was an illegal act, it must, under the *Johnson* case, be considered the beginning an illegal search, just as the entry into the room in the *Johnson* case was considered the beginning of an illegal search. Furthermore, if, as the *Johnson* case holds, the original illegal entry results in the exclusion of evidence obtained as the result of that illegal entry, whether or not an intervening arrest occurs, then here the original illegal act in stopping the car must necessarily preclude the use of an admission obtained as the result of that illegal act as the basis for a search.

Courts have in a number of instances assumed that law enforcement officers may on suspicion properly stop a car for the purpose of inquiry, and that, when inquiry confirms suspicion, a search may properly be made. *Morgan* v. *United States*, 159 F. 2d 85, 86 (C.C.A. 10); *Turner* v. *Camp*, 123 F. 2d 840, 842 (C.C.A. 5); *Kaiser* v. *United States*, 60 F. 2d 410, 412 (C.C.A. 8), certiorari denied, 287 U. S. 654; *Mabee* v. *United States*, 60 F. 2d 209 (C.C.A. 3); *Cohn* v. *United States*, 16 F. 2d 652, 653 (App. D. C.). None of these decisions, however, articulate even as clearly as does the majority below, their basic assumption that stopping a car is different from searching it, and that less proof is necessary to justify the act of stopping than would be necessary to justify a search.[1] It is difficult to reconcile this assumption with the principles enunciated by this Court in the *Carroll* case, 267 U. S. 132 at 153-154:

> * * * It would be intolerable and unreasonable if a prohibition agent were authorized to stop every automobile on the chance of finding liquor and thus subject all persons lawfully using the highways to the inconvenience

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[1] The majority opinion states (R. 39):

"The question presented then is whether the investigators, having sufficient information to suspect Brinegar, but not sufficient information to constitute probable cause for a search of the coupe and the arrest of Brinegar, could, after stopping him and interrogating him with respect to whisky in the coupe, lawfully act upon the information obtained as a basis for probable cause for the search and seizure."

> and indignity of such a search. Travellers may be so stopped in crossing an international boundary because of national self protection reasonably requiring one entering the country to identify himself as entitled to come in, and his belongings as effects which may be lawfully brought in. But those lawfully within the country, entitled to use the public highways, have a right to free passage without interruption or search unless there is known to a competent official authorized to search, probable cause for believing that their vehicles are carrying contraband or illegal merchandise. * * *

The act of forcibly stopping a car carries with it a certain amount of danger. And while we do not doubt that an officer may legitimately stop and question a pedestrian on suspicion not amounting to probable cause, or may legitimately question the driver of a vehicle who has stopped of his own accord (see, e.g., *Poulas* v. *United States*, 95 F. 2d 412 (C.C.A. 9); *Weathersbee* v. *United States*, 62 F. 2d 822 (C.C.A. 5), certiorari denied, 289 U. S. 737), we doubt that anything less than probable cause would justify the forcible stopping of a moving automobile. For that reason we base our conclusion that the judgment below should be affirmed on the ground that, on the facts of this case, the agents did have probable cause to stop and search petitioner's automobile.

CONCLUSION

Since the agents had probable cause to believe that petitioner was violating the Liquor Enforcement Act of 1936 at the time they stopped his automobile, the liquor obtained as a result of the search of that automobile was properly admitted in evidence. We, therefore, respectfully submit that the judgment below should be affirmed.

PHILIP B. PERLMAN,
Solicitor General.
ALEXANDER M. CAMPBELL,
Assistant Attorney General.
ROBERT S. ERDAHL,
BEATRICE ROSENBERG,
Attorneys.

AUGUST 1948.

APPENDIX

The Fourth Amendment to the Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Liquor Enforcement Act of June 25, 1936, c. 815, 49 Stat. 1928, 27 U.S.C. 221, ff., provides in pertinent part:

> Sec. 3. (a) Whoever shall import, bring, or transport any intoxicating liquor into any State in which all sales (except for scientific, sacramental, medicinal, or mechanical purposes) of intoxicating liquor containing more than 4 per centum of alcohol by volume are prohibited, otherwise than in the course of continuous interstate transportation through such State, or attempt so to do, or assist in so doing, shall: (1) If such liquor is not accompanied by such permit or permits, license or licenses therefor as are now or hereafter required by the laws of such State; or (2) if all importation, bringing, or transportation of intoxicating liquor into such State is prohibited by the laws thereof; be guilty of a misdemeanor and shall be fined not more than $1,000 or imprisoned not more than one year, or both.

* * * * *

> Sec. 4. All intoxicating liquor involved in any violation of this Act * * * and every vehicle or vessel used in the transportation thereof, shall be seized and forfeited. Such seizure and forfeiture, and the disposition of such property subsequent to seizure and forfeiture, or the disposition of the proceeds from the sale of such property, shall be in accordance with existing laws or those hereafter in existence relating to seizures, forfeitures, and dispositions of property or proceeds, for violation of the internal-revenue laws.

Oklahoma Session Laws, 1939, c. 16, Art. 1, Sec. 1, in effect at the time of the transportation charged in the information, provided:

> It shall be unlawful for any person, individual or corporate, to import, bring, transport, or cause to be brought or transported into the State of Oklahoma, any intoxicating liquor, as defined by the laws of this State, containing more than four (4%) per cent of alcohol by volume, without a permit first secured therefor as hereinafter provided.

Section 26 of the National Prohibition Act of October 18, 1919, c. 85, Title II, 41 Stat. 307, provided:

> Sec. 26. When the commissioner, his assistants, inspectors, or any officer of the law shall discover any person in the act of transporting in violation of the law, intoxicating liquors in any wagon, buggy, automobile, water or air craft, or other vehicle, it shall be his duty to seize any and all intoxicating liquors found

therein being transported contrary to law. Whenever intoxicating liquors transported or possessed illegally shall be seized by an officer he shall take possession of the vehicle and team or automobile, boat, air or water craft, or any other conveyance, and shall arrest any person in charge thereof.

The Liquor Taxing Act of January 11, 1934, c. 1, 48 Stat. 313, 26 U.S.C. 2803, ff., provides in pertinent part:

> Sec. 201. No person shall * * * transport, possess, buy, sell, or transfer any distilled spirits, unless the immediate container thereof has affixed thereto a stamp denoting the quantity of distilled spirits contained therein and evidencing payment of all internal-revenue taxes imposed on such spirits. * * *
>
> * * * * *
>
> Sec. 206. All distilled spirits found in any container required to bear a stamp by this title, which container is not stamped in compliance with this title and regulations issued thereunder, shall be forfeited to the United States. * * *

U. S. GOVERNMENT PRINTING OFFICE: 1948 739731 71

No. 12

In the Supreme Court of the United States

October Term, 1948.

VIRGIL T. BRINEGAR, *Petitioner,*

vs.

THE UNITED STATES OF AMERICA.

On Certiorari to the United States Circuit Court of Appeals for the Tenth Circuit.

MOTION TO STAY MANDATE
and
PETITION FOR REHEARING.

LESLIE L. CONNER,
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CHARLES A. WHITEBOOK,
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INDEX

CASE CITED.

IN THE SUPREME COURT OF THE UNITED STATES.

October Term, 1948.

No. 12.

VIRGIL T. BRINEGAR, *Petitioner,*

vs.

THE UNITED STATES OF AMERICA.

MOTION TO STAY MANDATE.

To the Honorable, The Supreme Court of the United States:

Comes now the petitioner, Virgil T. Brinegar, by his attorneys of record and respectfully moves the Court to stay the issuance of its mandate in this cause pending the determination of the Petition for Rehearing which is being filed herein simultaneously with this motion and in support thereof petitioner respectfully shows the Court:

I.

On June 27, 1949, this Court by its opinion in this cause on said date entered affirmed the judgment of the Circuit Court of Appeals of the Tenth Circuit, sustaining the conviction of your petitioner in the District Court of the United States for the Northern District of Oklahoma and the imposition of a fine of $100 and a sentence of imprisonment for a period of 30 days.

II.

That petitioner has prepared and is filing in due time, pursuant to Rule 33 of this Court, his Petition for Rehear-

ing herein. Petitioner states that said Petition for Rehearing is being filed in absolute good faith and not for the purpose of any delay, and that he sincerely believes the Court will favorably consider said petition.

IV.

Petitioner states that unless this Court enters an order staying the mandate herein to the Circuit Court of Appeals for the Tenth Circuit that the mandate herein will be issued on July 22, 1949, and that pursuant thereto the Circuit Court of Appeals will issue its mandate to the District Court and petitioner will be required to serve the punishment heretofore imposed upon him before this Court will have had time to act upon said Petition for Rehearing. That this would result in severe injustice and irreparable injury to petitioner if rehearing be granted. That the best interests of justice will be served if the mandate be stayed pending the determination of the Petition for Rehearing.

Wherefore, petitioner respectfully prays that this Court forthwith enter its order staying the issuance of its mandate in this cause pending the determination of the Petition for Rehearing.

LESLIE L. CONNER,
Oklahoma City, Oklahoma,
IRVINE E. UNGERMAN,
625 Wright Building,
Tulsa, Oklahoma,
Attorneys for Petitioner.

CERTIFICATE OF COUNSEL.

We hereby certify that the foregoing Motion to Stay Mandate in the above cause is presented to this Court in good faith and not for purpose of delay.

LESLIE L. CONNER,
IRVINE E. UNGERMAN,
Attorneys for Petitioner.

IN THE SUPREME COURT OF THE UNITED STATES.
October Term, 1948.

No. 12.

VIRGIL T. BRINEGAR, *Petitioner,*

vs.

THE UNITED STATES OF AMERICA.

PETITION FOR REHEARING.

To the Honorable, The Supreme Court of the United States:

Comes now Virgil T. Brinegar, petitioner, and respectfully petitions the Court to grant him a rehearing in this cause and in support thereof respectfully submits the following reasons and memorandum:

I.

Because the Court in its opinion, we respectfully submit, has inadvertently gone beyond the Record in the case; has in effect retried the matter *de novo*, and has bottomed its conclusion which deprives this petitioner of his freedom and liberty on the basis of an assumption of a material evidentiary fact which was not only held by the trial court to be undisputed to the contrary, but concerning which, because of such ruling defendant was denied the right of cross-examination of government witnesses, and the opportunity to disprove the assumption here indulged. Petitioner is thereby denied a fair and impartial trial.

II.

Because the Court in its opinion, in sustaining the conviction of Brinegar, we respectfully submit, has enlarged the holding of the *Carroll* case in such manner as in actual practice gravely to endanger the freedom and security of the American citizen from unlawful search and seizure guaranteed by the Fourth Amendment and to deny him the right of effective judicial review of the action of overzealous police agents of the Federal Government.

III.

Because the opinion has placed the stamp of this Court's approval on the practice of Federal Agents lying in ambush or in wait on all roads leading into Oklahoma (Oklahoma has no roads leading into the state which do not come from "wet" states) and indiscriminately stopping to search for evidence of violation of law all automobiles which they suspicion of carrying liquor or which are driven by persons whom they know or suspect are transporters of whiskey. Such a test, we respectfully submit, makes meaningless the check of "probable cause."

IV.

Because the opinion of the Court will, we respectfully submit, create confusion as to the law of search and seizure and the protection to be afforded by the Constitutional Amendment. This opinion, we humbly submit, abdicates the principle upon which we believe rests the basic concept of individual liberty in a democracy: That judicial sanction or constitutional sanction subject to judicial review is a condition precedent to the lawful exercise of power by Federal police agents.

V.

Because the principle enunciated by the Court's opinion, if permitted to stand, we respectfully submit, repudiates long established precedent of this Court and on the basis of expediency renders impotent and sterile those fundamental safeguards which, in earlier day were by the forefathers established as and by this Court declared to be, "the very essence of constitutional liberty and security."

VI.

Because the principles and the law announced by the opinion of the Court are, we respectfully submit, of such fundamental and of such great importance to the citizens of the United States, as well as to the petitioner, that the opportunity should be granted petitioner to make a full and complete record and the question on the basis of all the evidence adduced should be re-examined.

We believe sincerely that this case is and will be a landmark case. We believe that the principle which it announces, as applied to the facts, ranges far beyond, and its implications dwarf to practical insignificance the conviction or failure to convict Virgil T. Brinegar of a misdemeanor. We urge that the result obtained is fraught with the deepest public significance; only time will tell whether in fact the tyranny of which we are honestly apprehensive will in fact arise. The great teachings of the forefathers distilled into the Fourth Amendment out of the tyranny that was Britain should be indelibly impressed upon our conscience by the experiences of other peoples under the dictatorial tyrannies of the present day. It can happen here. If such result is possible under the opinion it should not be permitted to stand. Law enforcement and the conviction of those guilty of crime is admittedly essential to the well-

being and order of society. The conviction of those guilty of crime by methods beyond the pale of the law, however, is the abrogation of law and order.

We respectfully submit that the petition for rehearing be granted, and so we respectfully pray.

LESLIE L. CONNER,
IRVINE E. UNGERMAN,
Counsel for Petitioner.

CERTIFICATE OF COUNSEL.

We hereby certify that the foregoing petition for rehearing of the above cause is presented to the Court in good faith, and not for purpose of delay.

LESLIE L. CONNER,
IRVINE E. UNGERMAN,
Counsel for Petitioner.

MEMORANDUM IN SUPPORT OF PETITION FOR REHEARING.

I.

The fundamental difference between American democracy and the European dictatorships lies in a living Bill of Rights—the reservation to the citizen of certain rights and liberties as against his government. Our "forefathers, after consulting the lessons of history, designed our Constitution to place obstacles in the way of a too permeating police surveillance."[1]

From the earliest day to yesteryear this Court has steadfastly reaffirmed that it does not admit of the necessity of permitting police officers of the Federal government to search for evidence for the conviction of the citizen without the judicial safeguard of a warrant obtained from a magistrate upon a showing of "probable cause"; and if, as in the case of a moving vehicle, time does not permit of the obtaining of such a warrant, then to proceed without warrant but upon "probable cause".

We respectfully submit that the holding of the Court's opinion tends to destroy and make meaningless the fundamental requirement of "probable cause"; that it places this Court's mark of approval on the vicious practice of Federal Agents in lying-in-wait on all roads leading into Oklahoma and indiscriminately stopping to search for evidence of liquor law violation all automobiles which they *suspicion* of carrying liquor or which are driven by persons whom they suspicion are engaged in the illegal transportation of tax-paid liquors.

1. *United States* v. *Di Re*, 332 U. S. 581.

II.

We fully appreciate the reluctance of this Court to re-examine matters which have been thoroughly argued and supposedly closed by the writing of an opinion. The Brinegar opinion on its face discloses a most intensive analysis and learned research by the Court. We know that the issues involved were considered by this Court at great length; and it is evident from the most persuasive dissenting opinion of Mr. Justice JACKSON that questions of "policy" were ably presented to the majority of the Court and fully debated.

We are in agreement with the statement of *the law* as set forth in the Court's opinion:

> "But one who *recently* and *repeatedly* has given *substantial* ground for believing that he is engaging in the forbidden transportation *in the area of his usual operations* has no such immunity, if the officer who intercepts him *in that region knows* that fact at the time he makes the interception and the circumstances under which it is made are not such as to indicate the suspect is going about legitimate affairs." (Opinion, p. 17, emphasis ours.)

But we respectfully urge that *under the very test of the opinion* the Record and the evidence is clear and undisputed that Brinegar *had not recently* nor *repeatedly* given any substantial ground for believing that he was engaging in illegal transportation; that he *was not* operating *"in the area of his usual operations"*; that Malsed *did not* arrest him "in that region" and did not know he had moved to Vinita, Oklahoma; that there were absolutely *no* physical facts or circumstances which would indicate that the suspect was not proceeding about his legitimate affairs; that the inferences drawn by the opinion to the contrary are

wholly without support in this Record; that under the test of the opinion the finding of the trial court and the Circuit Court of Appeals that the search and resultant seizure here involved were undertaken wholly without probable cause is compelled by the facts of record.

We respectfully ask the Court's indulgence briefly to review the Record evidence. The Court, we respectfully submit, has gone beyond the Record in this case and has bottomed its conclusion on assumptions of material evidentiary facts which at trial were ruled by the Court and accepted by the parties as established to the contrary and concerning which defendant was denied the right of cross-examination of government's witnesses; and is now denied the opportunity to disprove in fact the error of the assumptions made by this Court and inferences set forth in the opinion.

If we correctly understand the opinion, the Court's conclusion is based upon the following: That "Malsed had arrested him (Brinegar) about five months earlier *for illegally transporting* liquor" (opinion, p. 2); that "* * * they recognized both the driver and the car from *recent* personal contact and observation, as having *been lately engaged in illicit liquor dealings.*" (opinion, p. 6); "And several months prior to the search he had arrested Brinegar for unlawful transportation of liquor and this arrest had resulted in an indictment which was pending at the time of trial" (opinion, p. 10). Added to this was the general locale of the setting and the additional fact that both the agents testified that "the car, but not especially its rear end, appeared to be 'heavily loaded' and 'weighted down with something'." (Opinion, p. 2.)

Correctly the Court points out, and we agree, that: "The troublesome line posed by the facts in the *Carroll*

case and this case is one between mere suspicion and probable cause." (Opinion, p. 16)

If ever there was a case in which the action of the agents was based solely upon "suspicion," we respectfully submit, this is it. We earnestly and respectfully submit that the inferences upon which the Court bases its conclusion are contrary to or without support of the Record.

On direct examination the witness Malsed testified that the Brinegar car "was loaded." (R. 8). On cross-examination of this witness counsel for petitioner proceeded to cross-examine as to the *physical basis for such "observation."* He established that "the liquor was in the center of the car and not in the turtle back; that the weight would be in the center of the car"; that not more than 500 or 600 pounds of weight were being carried *so that as matter of physical fact the appearance of the car gave no possible indication of violation of law to the officer* which would constitute probable cause, when he was interrupted by the Court (R. 9):

> "The Court: Well, Mr. Simms, this witness had not testified that the springs were sagging or anything of that sort. *I don't think his testimony tends to indicate that the car had such appearance as to afford probable cause.* He just said it appeared to be heavily loaded.
>
> Mr. Simms: Heavily loaded. And that is what I was——
>
> The Court: Well, that is not enough in my judgment *unless you can describe more particularly, the appearance which would constitute probable cause.* I am going to assume that the appearance of the car based on his statement that it was heavily loaded, is not enough to constitute probable cause." (R. 9) (Emphasis ours.)

Upon such ruling from the Court, counsel properly desisted from further cross-examination on this subject. *For the purpose of trial this was an established fact.* The government *did not come forward with any further or additional proof or testimony!* Under that state of the record it must be assumed, in fairness and justice, that the Government had no further testimony and that there was no physical basis to show that the appearance of the car would constitute probable cause. The assumption of a directly contrary fact by this Court, we respectfully submit, deprives petitioner of a fundamental right of trial. In a case so close as this case admittedly is, the fact that the car appeared to be "heavily loaded" is too material an element of "probable cause" to disregard.

Identically the same situation exists are regards the testimony of Investigator Creehan: He testified that the car appeared to be "weighted with something." (R. 11) Counsel for defendant again proceeded to show upon cross-examination that there was in fact no physical basis for such conclusion and that it could not constitute "probable cause" when again the Court interrupted:

> "The Court: The witness has already stated *there was no appearance in the rear that indicated—that the car was heavily loaded.* Usually the testimony is that the springs were sagging and so on, but we don't have that in this case." (R. 12)

III.

Other matters of material importance, such as geography, availability of liquor supply, proximity of Joplin, Missouri, to Vinita, Oklahoma, probability of violation, etc., are all noted by the opinion outside the Record. While we recognize the authority of the Court to do so and we

appreciate that the justices of this Court are men of wide experience and great learning we feel constrained respectfully to point out to the Court the danger and the fallacy into which such an excursion leads.

The opinion lays great stress upon the fact that "Malsed had arrested him (Brinegar) about five months earlier for illegally transporting liquor; had seen him loading liquor into a car or truck in Joplin, Missouri, on at least two occasions *during* the preceding six months." (Opinion, p. 2.) We respectfully submit that the statement is not supported by the Record. Malsed's testimony is clear and certain: He had seen Brinegar only *twice previously;* on September 23, and September 30, 1946. On both occasions Brinegar was gathering up liquor *in a truck.* September 30, 1946, is the date of the *first arrest.* The testimony is clear that this is the only time he saw Brinegar and *that he had not seen him at all during* the period from September 30, 1946, and the date of this arrest, March 3, 1947. (R. 16)

Additionally the opinion lays great emphasis on the first arrest because the Court finds that Malsed had arrested Brinegar for "unlawful transportation of liquor." *But what does not appear of record is the fact that Brinegar was on the trial of this charge of alleged unlawful transportation by the Court acquitted and found not guilty of unlawful transportation of liquor.* That arrest was not, as seems to be inferred by the opinion, an arrest under the same conditions and circumstances as are here involved. That arrest was made in *Missouri* and not in Oklahoma. It was made in a "wet" state—not a "dry" one. The only point in common between the two is that Malsed made both arrests purely upon suspicion. It is the very type of action against which we earnestly protest. That case (which was pending at the time of trial) was tried before Hon. ALBERT

A. Ridge, United States District Judge, sitting at Joplin, Missouri, and on motion for judgment of acquittal the Court discharged the defendant. In this connection we believe it important to note that Brinegar has no criminal record—and had none at the time here involved.

IV.

That judgment of acquittal further points up, we respectfully submit, the significance of the distinction urged upon this Court and which the opinion rejects: That the loading of liquor by Brinegar in Joplin, Missouri, in *September, 1946, cannot* under any circumstances reasonably give rise to a belief of a *prudent and cautious man* that violation was occurring when Malsed saw Brinegar on *March 3, 1947*. It is a most dangerous and unwarranted principle, we respectfully submit, to allow an inference of illegality to flow from the doing of a perfectly legal act.

Perhaps it is because the trial judge and the judges of the Circuit Court of Appeals were familiar with the fact that daily hundreds of good Oklahoma citizens "load up" whiskey at Joplin, Missouri, and other points for their own personal use and pleasure and that such fact is "common knowledge" in Oklahoma that they refused to draw the inferences and conclusions from such conduct which this Court so readily assumes. Perhaps it was the knowledge of the *local situation* which these judges had which made it so completely unreasonable to them to compare the situation here involved with the circumstances of the *Carroll* case that they did not deem the *Carroll* case in point on the facts. Perhaps it was their knowledge that the fact of the purchase of liquor in Joplin by an Oklahoma citizen *does not* in any manner indicate that the person is engaged in the illicit liquor business. Whatever be the reason, the proof

is now positive that such acts committed on September 23 and September 30th, 1946, and the "transportation" for which Brinegar was arrested on September 30th were *in fact* perfectly legal acts which cannot and should not furnish any basis for probable cause such as would remove the mantle of the Fourth Amendment from about the citizen.

V.

If Brinegar had in fact been prior to this time transporting liquor *into Oklahoma* that fact was wholly and completely unknown to the Federal Agents. Creehan did not even know him. Malsed certainly had neither knowledge nor any cause for such belief. In September, 1946, when Malsed *last saw* Brinegar prior to this arrest, Brinegar lived in Hiwasse, Arkansas. Arkansas is a "wet" state. He had a farm there. (R. 29) He did *not* live in Vinita, Oklahoma, during all this period of time. (R. 30). He had been living in Vinita only a short time. *Malsed had no knowledge* that he had moved or that he was going to Vinita. The second question which he propounded to Brinegar was: "I asked him if he was going to Hiwasse with the liquor, and he said, no, he was going to Vinita this time." (R. 19)

We respectfully disagree for the reasons above stated in paragraphs II, III, IV and V that the evidence is clear and undisputed that the agent had good ground for believing that Brinegar *was engaged regularly throughout the period in illicit liquor running and dealing.* There is nowhere in the record, we seriously and most respectfully submit, an iota of evidence upon which an inference may be drawn that Brinegar at any time dealt in liquor. We respectfully submit the inferences of the opinion are in error and are not supported by the Record.

VI.

As we read the opinion there is still required something more than mere suspicion to justify a search; probable cause requires that "the facts and circumstances within their knowledge, and of which they had reasonably trustworthy information, (be) sufficient in themselves to warrant a man of reasonable caution in the belief that" an offense has been or is then being committed. (Opinion, pp. 15-16.)

Although the opinion brushes aside the findings of the District Court and the conclusions of the Court of Appeals that probable cause did not exist when the Federal officers commenced their search as being "erroneous," we respectfully submit that they cannot be so summarily dismissed. The test is: Did the officers act on suspicion that Brinegar was then carrying liquor or did they, acting as reasonably cautious and prudent men, have sufficient information to reasonably warrant a belief that an offense was then being committed.

On the facts of this case Hon. Royce H. Savage, a most learned and extremely able trial judge, and Judges Phillips, Huxman and Murrah, the learned judges of the Circuit Court of Appeals for the Tenth Circuit, were all of the opinion that probable cause did not exist.

This Court in its opinion notes the complete absence of citation of the *Carroll* case in the opinions of the trial court and the Court of Appeals and leaves the implication that the *Carroll* case was overlooked and not considered below. This is error. The *Carroll* case was cited to the Court by both the appellant and the government, argued to it and was considered by it. The identical argument which was made by the government in its brief in this Court was

substantially advanced by the government in its brief and argument before the Circuit Court of Appeals.[2]

We deem it as important here that the lower courts expressly found that there was *no probable cause*, as the Court did in the *Carroll* case that the lower court found that there *was probable cause*. The judges below and each of them, who are thoroughly acquainted with the locale, the local circumstances and the inferences reasonably to be drawn therefrom, who try and review scores of these cases annually, felt, understood and knew that the facts within the knowledge of the investigators were as a matter of fact, insufficient to constitute probable cause.

VII.

The learned trial judge prophetically foresaw and correctly analyzed the effect of a holding of the presence of probable cause under the circumstances of this case: "To so hold would in effect be to say to the officers that they may just make a search of the automobiles of known bootleggers on sight; that is about what it would amount to in my judgment." (R. 12) That is exactly what the opinion does. It completely withdraws from "known bootleggers" or anyone whom the Agents may reasonably suspect the protection of the Fourth Amendment. The police officer himself can now determine the incidence of the Amendment and himself provide probable cause by "knowing" that the per-

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2. Brief of Appellee, United States Circuit Court of Appeals, 10th Circuit, No. 3518, *Virgil T. Brinegar, Appellant, v. United States of America, Appellee*, pages 5 and 6; the same argument was made at trial (R., p. 12).

See also, dissenting opinion of HUXMAN, J. (R., p. 42): "That they would have searched his car in any event is borne out by the position the Government takes in this appeal, that the condition of the car at the time they first observed it, plus the fact that Brinegar had the reputation with the Alcohol Tax Unit Agents of dealing in liquor, constituted probable cause warranting a search without a warrant."

son whose car he desires to search is a bootlegger or has a reputation of being engaged in illegally transporting liquor. There is no longer any valid check. We respectfully ask the Court to take notice of the fact that all bootleggers' cars look heavily loaded to an A. T. U. agent at all times, whether in fact, there is any physical basis or not. This is an optical impairment acquired from the exigencies of his trade. Whenever, therefore, he sees and recognizes a bootlegger he automatically has probable cause to search his car.

We respectfully protest such result. We believe it is an *extension* of the *Carroll* case and not an application of its principle. If the lack of "knowledge" on the part of the Agents may be affirmatively proved, we respectfully request that the case be remanded with proper directions so that we can demonstrate to the Court clearly and conclusively that which we, the trial court and the judges of the Court of Appeals erroneously believed to be obvious—that without question, under the rule of the *Carroll* case, and under the test provided by the Court's opinion the search here involved commenced upon mere suspicion and not upon probable cause.

VIII.

We most respectfully urge that the Court lend further ear to the warnings sounded by the dissenting opinion of Mr. Justice JACKSON. He has better and more ably presented the matter than have counsel for petitioner. Perhaps we have helped to point out that the distinctions which he draws are valid, both legally and factually. "* * * we must remember that the authority which we (the Court) concede to conduct searches and seizures without warrants may be exercised by the most unfit and ruthless officers as well as by the fit and responsible, and resorted to in case of petty misdemeanors as well as in the case of the gravest

felonies * * * We must remember (too) that the extent of any privilege of search and seizure without warrant which we sustain, the officers interpret and apply themselves and will push to the limit." (Justice JACKSON, Dissenting Opinion, p. 3.)

No difficulty of rule or practice or procedure ought to prevent the completion of the record in this case and a full reconsideration of the matter by this Court. In the interests of justice to the petitioner and the safeguarding of the fundamental rights of the citizens of these United States we respectfully pray that a rehearing be granted.

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